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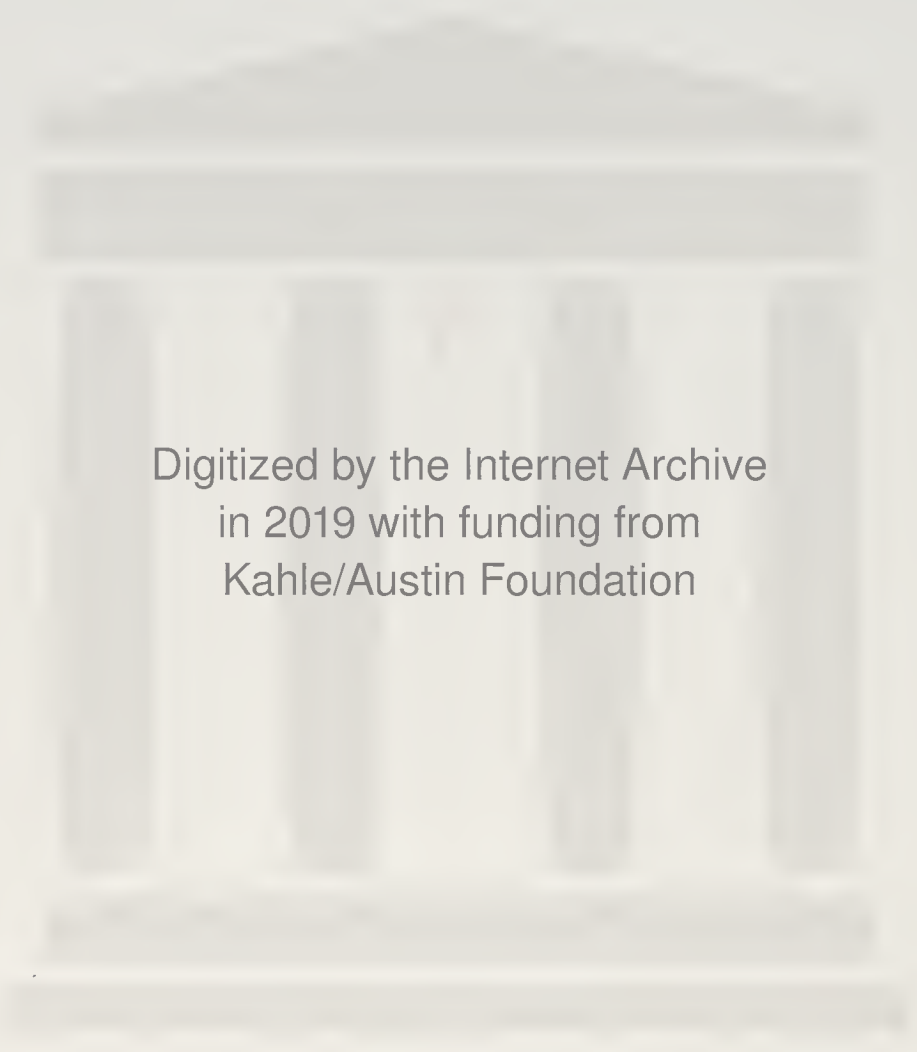








THE BRITISH YEAR BOOK OF  
INTERNATIONAL LAW



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INTERNATIONAL LAW  
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# THE CONSEQUENCES OF AN INTERNATIONAL WRONG IN INTERNATIONAL AND NATIONAL LAW\*

By F. A. MANN<sup>1</sup>

THE doctrine of the international wrong, that is to say, the violation of a duty imposed by public international law, is both one of the most important and one of the most intricate chapters of public international law. It is, on the one hand, so important because it is that part of public international law with which the practising lawyer most frequently comes (or ought to come) into contact, for wrongs suffered by a physical or legal person at the hands of a foreign State are unfortunately a matter of daily occurrence, although they are not always diagnosed as such, and even if they are, the absence of diplomatic protection or the lack of submission by the wrongdoing State to a tribunal is likely to render a remedy illusory. On the other hand, the intricacy arises from the existence of a relatively large amount of material on State responsibility, from which, however, in many respects a firm rule has not yet been evolved. Thus even such elementary questions as the scope of *abus de droit* as a cause of action<sup>2</sup> or the imputability of acts occurring within its jurisdiction to the State<sup>3</sup> are to some extent controversial and in need of that clarification which only a developed body of judicial decisions can provide.

Moreover, assuming an international tort to have been established, the nature of the rights which it is open to the claimant State to assert is not free from doubt. This, indeed, is the first topic to which in the following observations it is proposed to turn (below, section I). There then arises the question how national legal systems treat, or should treat, a set of facts which in public international law would be considered an international wrong. This is a problem which requires discussion, from the point of view of legal principle, with reference to the effects of violations of customary (below, section II) and conventional (below, section III) international law by the forum and by a foreign country (below, section IV). But no contribution to its solution is likely to be useful without the illustration which practical cases can supply; accordingly a review of three entirely different sets of fact which have arisen in the practice of courts and arbitral tribunals will have to be analysed (below, sections V to VII).

Each aspect of the general problem which has thus been indicated has in the

\* © Dr. F. A. Mann, 1977.

<sup>1</sup> F.B.A.; Honorary Professor of Law in the University of Bonn; Solicitor of the Supreme Court in London; Associate of the Institut de Droit International.

<sup>2</sup> See, most recently, Taylor, this *Year Book*, 46 (1972-3), p. 323 with further references.

<sup>3</sup> On this subject see the weighty Reports by Professor Ago, *Yearbook of the International Law Commission*, 1971, vol. 2, p. 199; 1972, vol. 2, p. 71.



past led to much discussion. On certain points extensive material has been collected by scholars and many different suggestions have been made, sometimes with a measure of emphasis and even special pleading. It is not proposed in the course of the following remarks to review the whole field, to analyse every point or to aim at completeness of citation. Sufficient references will, it is hoped, be given to facilitate the student's further research in a branch of the law which is in a state of continuous and rapid evolution and is, therefore, liable to undergo unexpected changes. Nor will the expert have any difficulty in ascertaining what the author intends to accept or to reject, or any novel point that he may venture to suggest.

## I. THE EFFECTS OF INTERNATIONAL WRONGS IN INTERNATIONAL LAW

The rights which, as a result of an international wrong, the claimant State acquires against the wrongdoing State are frequently (and rightly) said to include such remedies as intervention, reprisals, satisfaction or apology. These are somewhat esoteric means of redress which may safely be ignored in order to permit a closer look at the great problems which continue to bedevil the more usual rights States prefer to pursue.

1. It is probably no exaggeration to say that *reparation* is still the primary and most frequently sought form of relief. After almost fifty years the definition of its legal nature remains to be found in the often quoted and characteristically precise statement by the Permanent Court of International Justice in the *Chorzów Factory* case, which does not become less weighty by reason of the fact that to some extent it was obiter:<sup>1</sup>

The essential principle contained in the notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.

Reparation may thus take two different forms, restitution in kind or the payment of damages, the former being clearly the primary remedy, although, as the Court said elsewhere in the same judgment, monetary compensation 'is even the most usual form of reparation' and was in fact 'selected' by Germany in that case.<sup>2</sup>

Restitution in kind, it is true, is largely unknown to the common law which, in principle and somewhat paradoxically, adheres to the rule of Roman law *omnis condemnatio est pecuniaria* and calls it *restitutio in integrum* (which it is

<sup>1</sup> *P.C.I.J.*, Series A, No. 17 (1928), p. 47. Germany had actually claimed damages.

<sup>2</sup> *Ibid.*, pp. 27, 28.

not<sup>1</sup>). Yet it should not be overlooked that even in England, for instance, the plaintiff in an action for detinue is by no means confined to monetary relief, but is entitled to delivery-up of the chattel.<sup>2</sup> This, in fact, is the approach adopted in most continental countries where, broadly, in many cases the victim will obtain *naturalis restitutio* and where the law allows him such relief as in the circumstances is most appropriate. Thus in Switzerland it is the judge who determines 'le mode ainsi que l'étendue de la réparation d'après les circonstances et la gravité de la faute'.<sup>3</sup> In France, if the circumstances permit it, the victim has the choice.<sup>4</sup> In Germany, in cases which do not involve injury to a person or thing, the victim can claim damages only where restitution in kind is impossible or insufficient.<sup>5</sup>

In the first place it seems fairly clear that as a rule public international law has for long recognized restitution in kind as a right, probably as the principal right, against the wrongdoing State. Many writers of authority have not only asserted, but also explained, developed and applied the rule;<sup>6</sup> few have denied it.<sup>7</sup> None has asserted the exclusivity of the claim for damages;<sup>8</sup> such a theory would, indeed, be unacceptable in that it would favour the defaulter and deprive the victim of a useful right. One author of authority has subdivided the wrongdoer's duty into a duty to restore where a situation has been illegally created and a duty to make good (*Nachholepflicht*) where the wrongdoer has

<sup>1</sup> In English municipal law the expression 'restitution *in integrum*' is used to indicate the measure of damages to which the victim is entitled: see, e.g., McGregor, *Damages*, 13th edn. (1972), Section 10. It was in this sense that the expression was employed by Sir Hersch Lauterpacht, *Private Law Sources and Analogies* (1929), p. 147.

<sup>2</sup> See the illuminating judgment of Diplock L.J. (as he then was) in *General and Finance Facilities Ltd. v. Cooks Cars (Romford) Ltd.*, [1963] 2 All E.R. 314. See now the Torts (Interference with Goods) Act 1977.

<sup>3</sup> Art. 43 of the Code of Obligations.

<sup>4</sup> See, for instance, Mazeaud, *Leçons de Droit Civil*, vol. 2 (1966), No. 621.

<sup>5</sup> Sections 249 to 251 of the Civil Code.

<sup>6</sup> Jiménez de Aréchaga in Sørensen, *Manual of Public International Law* (1968), pp. 565, 566, who regards restitution in kind as the normal remedy; Berber, *Lehrbuch des Völkerrechts*, vol. 3 (1977), pp. 25, 26, who says in terms that in law restitution in kind is the primary right; Brownlie, *Principles of Public International Law*, 2nd edn. (1973), p. 448 who regards it as exceptional; Dahm, *Völkerrecht*, vol. 3 (1961), pp. 232, 233; Duckwitz, *Rechtsfolgen bei Verletzung völkerrechtlicher Verträge* (1975), p. 31; Eagleton, *Responsibility of States in International Law* (1928), p. 182; François, *Recueil des cours*, 66 (1938-I), p. 281; Lais, *Rechtsfolgen völkerrechtlicher Delikte* (1932), p. 29; O'Connell, *International Law*, 2nd edn. (1970), p. 1114; Reuter, *Droit international public* (1958), p. 157; Salvioli, *Recueil des cours*, 28 (1929-III), p. 237; Schüle in Strupp-Schlochauer, *Wörterbuch des Völkerrechts*, vol. 1, pp. 337, 338 and vol. 3, p. 843; Schwarzenberger, *International Law*, 3rd edn. (1957), pp. 653 sqq.; Spiropoulos, Niemeyer's *Zeitschrift für internationales Recht*, 35 (1925/6), p. 59; Strupp, *Das völkerrechtliche Delikt* (1920), p. 209; Verdross, *Völkerrecht*, 5th edn., p. 400; Verdross and Simma, *Universelles Völkerrecht* (1976), pp. 630, 631, who state particularly clearly that restitution in kind is the primary right and damages are only subsidiary in the sense that they can only be claimed if restitution in kind is impossible; Verzijl, *Jurisprudence of the World Court*, vol. 1 (1965), p. 172 and *International Law in Historical Perspective*, vol. 6 (1973), pp. 742 sqq.; Weil, *Recueil des cours*, 128 (1969-III), p. 225 with references; Wengler, *Völkerrecht* (1964), pp. 503, 510; Dupuy, *Clunet*, 1977, pp. 384-7, as Sole Arbitrator.

<sup>7</sup> The most important, perhaps the only, one of them is Kelsen, 'Unrecht und Unrechtsfolge im Völkerrecht,' *Zeitschrift für öffentliches Recht*, 12 (1932), p. 481. Against him Verdross, *Völkerrecht*, 5th edn. (1964), p. 398.

<sup>8</sup> For a possible exception see Baade, *American Journal of International Law*, 54 (1960), p. 801.



wrongfully failed to create a situation.<sup>1</sup> The Harvard Draft Convention, prepared under the auspices of Professors Sohn and Baxter, recognizes the principle by providing in Article 27 that the reparation which a State is required to make for a wrongful act or omission may take the form of 'measures designed to re-establish the situation which would have existed if the wrongful act or omission . . . had not occurred', damages or a combination thereof.<sup>2</sup> A proper sense of responsibility will require full weight to be given to so unanimous a body of scholarly opinion which, as will appear,<sup>3</sup> is in harmony with the practice of numerous States and which was judicially approved already in 1917, when the Central American Court of Justice decided the case of *El Salvador v. Republic of Nicaragua*.<sup>4</sup> Nicaragua had entered into the so-called Bryan-Chamorro Treaty with the United States of America, which, so El Salvador alleged, was in violation of treaty and other rights due from Nicaragua. The Court found<sup>5</sup> that 'the Government of Nicaragua is impressed with the obligation to take all possible means sanctioned by international law to re-establish and maintain the legal status that existed between the two countries prior to the conclusion of the Bryan-Chamorro Treaty'. And the actual order made by the Court was framed in similar terms.<sup>6</sup>

Next it appears to depend on the circumstances of the case and on the claimant State's choice whether the wrongdoing State can or should make restitution in kind or pay damages. Thus if a person has been illegally abducted from the territory of the claimant State, as happened in the case of Jacob-Salomon who was abducted by Nazi Germany from Swiss territory,<sup>7</sup> it is the return of the person that can, and usually will, be claimed because it alone will undo the wrong. There is, however, no reason why damages should not be claimed and this would in any event be the only claim if, for instance, the individual in question had been killed. Or take the *Barcelona Traction* case.<sup>8</sup> There the Belgian State claimed<sup>9</sup> that the reparation due to it 'must be complete and must, so far as possible, reflect the damage suffered by its nationals . . . since *restitutio in integrum* is, in the circumstances of the case, practically and legally impossible, the reparation of the damage suffered can only take place in the form of an all-embracing pecuniary indemnity'. Nor did Spain attack the Belgian decision to claim damages rather than restitution in kind. The latter relief would have been inappropriate and impracticable, seeing that some twenty-two years had passed since the date of the alleged wrong and the property in question had entirely changed its character. On the other hand, in the

<sup>1</sup> Wengler, *op. cit.* (above, p. 3 n. 6), pp. 503, 510.

<sup>2</sup> Sohn and Baxter, *American Journal of International Law*, 55 (1961), p. 545, at p. 580.

<sup>3</sup> See below, p. 5 n. 1, p. 6 n. 4, p. 7 n. 3, where examples of recent cases are given in which States have claimed and sometimes obtained restitution in kind.

<sup>4</sup> *American Journal of International Law*, 11 (1917), p. 674.

<sup>5</sup> *Ibid.*, p. 728.

<sup>6</sup> *Ibid.*, p. 730.

<sup>7</sup> On this well-known incident see, among others, Oppenheim (ed. Lauterpacht), *International Law*, vol. 1, 8th edn. (1955), p. 295. It should, however, be noted that many of the authors mentioned at p. 3 n. 6 above, emphasize the primacy of the right to restitution in kind. See, for instance, Schwarzenberger, Spiropoulos, Verzijl, or Eagleton.

<sup>8</sup> *I.C.J. Reports*, 1970, p. 3.

<sup>9</sup> *Ibid.*, p. 23.

*Interhandel* case<sup>1</sup> Switzerland asked and could ask the Court to 'declare . . . that the Government of the United States is under an obligation to restore the assets' of the Swiss company. These few examples make it clear that too much must not be read into the fact that many treaties have provided for the assessment of financial compensation rather than restitution in kind or that some arbitral tribunals have even described such compensation as the normal remedy.<sup>2</sup> It may well be that the cases in which compensation is adequate are more numerous or that States prefer to agree upon the payment of compensation, but this experience does not permit a legal principle to be inferred. At the same time it would be equally unjustifiable to state in categorical terms that damages are only the alternative entitlement available if and when restitution in kind fails, or to discuss what is the rule and what is the exception. The true position, it is submitted, is that the claimant State has an option which it must reasonably exercise:<sup>3</sup> no tribunal will be bound by a choice which is arbitrary or inappropriate in the light of the facts.<sup>4</sup>

Finally it must be emphasized that, whatever form of reparation the claimant State may be entitled to claim, it may be satisfied with something less or different and that the question of remedies is to be clearly distinguished from that of entitlement. Remedies depend on the jurisdiction and procedure of the tribunal. They may not always coincide with the substantive right. In addition the latter may have to be considered independently of proceedings between the claimant and the defaulting State. Thus it may have a bearing on the interpretation of treaty provisions which give effect to it, as the Peace Treaties with Italy and other States did after the Second World War when they imposed a duty to restore the property of United Nations nationals.<sup>5</sup> Or the substantive right may be relevant in proceedings before a municipal court, and in such event the question whether and how it could be enforced in an international court would not be allowed to blur the issue. This may occur, for instance, if an individual is being sued for conspiring by instigating or exploiting the international tort.

2. The second question, much less frequently explored, is whether international law contemplates *nullity* as a possible consequence of an international wrong—and, regardless of the many refinements which dominate the sparse literature on the subject,<sup>6</sup> nullity will be understood as signifying something

<sup>1</sup> *I.C.J. Reports*, 1959, p. 9.

<sup>2</sup> See, e.g., in the *Lusitania* case the United States-German Mixed Claims Commission, *Reports of International Arbitral Awards*, vol. 7, pp. 32, 35. Cf. *Affaire des Forêts du Rhodope Central*, *ibid.*, vol. 3, p. 1405, at p. 1432: the question whether restitution in kind or payment should be awarded was left to the arbitrator, who decided in the latter sense.

<sup>3</sup> This is, in substance, what is suggested by Oppenheim (ed. Lauterpacht), *International Law*, vol. 1, 8th edn. (1955), p. 353.

<sup>4</sup> For this qualification see, in particular, Verdross, *op. cit.* (above, p. 3 n. 6), p. 401, and Berber, *op. cit.* (above, p. 3 n. 6), p. 25.

<sup>5</sup> For a convenient survey see Whiteman, *Digest of International Law*, vol. 8, pp. 1202 sqq.

<sup>6</sup> Verzijl, *Revue de droit international*, 9 (1935), p. 284—a fundamental contribution; Guggenheim, *Recueil des cours*, 74 (1949-I), p. 237 and *Traité de droit international public*, 2nd edn. (1967), p. 67; Jennings, *Cambridge Essays in International Law* (1965), p. 64; Baade, *Indiana Law Journal*, 39 (1964), p. 497 (who does not consider the validity of internal acts which are contrary to international law: p. 512); Paul de Visscher, *Recueil des cours*, 136 (1972-II), p. 90. On the effects



that is, in a broad sense, null and void rather than voidable and as primarily affecting acts of municipal law which constitute an international illegality.<sup>1</sup>

Obviously the problem arises only where it is a juristic act such as legislation, an executive order or a judicial decision that is alleged to be tortious. In such cases it may happen that nullity, and possibly a judicial declaration of nullity, is the only effective method or at least the necessary concomitant of an effective method for the protection of the victim State. It may in fact be little more than a step in the practical implementation of the idea of restitution in kind. If, as a matter of the restoration of the *status quo*, the wrongdoing State may be ordered to abrogate or nullify one of its acts, it is by no means extravagant to suggest that, at least *vis-à-vis* the claimant State that act is null and void. This is no new suggestion. Thus Professor Guggenheim, among others,<sup>2</sup> has said:<sup>3</sup> 'La nullité joue également un rôle en tant que modalité de la réparation d'un acte illicite'. The association of ideas is also clearly indicated in the award in *l'Affaire Martini*<sup>4</sup> where the Arbitrator decided that on account of the international wrong inherent in a Venezuelan judgment 'le Gouvernement Vénézuélien est tenu de reconnaître, à titre de réparation, l'annulation des obligations de paiement imposées à la Maison Martini & Cie.'. The close connection with the idea of reparation has led one author even to suggest that an international wrong does not create a nullity at all, but that the tortious act 'according to the principles of restoration of the status quo must be reversed by the wrongdoing State',<sup>5</sup> but, as will appear, so extreme a view is opposed to prevailing practice.

If the sanction of nullity fits well into the fundamental principles of public international law, it leads to the continued existence and recognition of the *status quo*. Indeed, in the words of Sir Hersch Lauterpacht, 'the absence of more direct means of enforcement tends to endow the principle of nullity of illegal acts with particular importance in the international sphere'.<sup>6</sup> This is well exemplified by the effects of non-recognition of States or governments: it implies non-existence in relation to the non-recognizing State. Moreover, nullity of the wrongful act is demanded or at least suggested by the basic principle of public international law, *ex injuria non oritur jus*.<sup>7</sup> Another, of illegal acts of international organizations see E. Lauterpacht, *Cambridge Essays in International Law* (1965), p. 88.

<sup>1</sup> Acts of general international law in connection with which the problem of nullity arises are infrequent. As to treaties see now Articles 42 sqq. of the Vienna Draft Convention. The case of the premature recognition which is sometimes mentioned is a doubtful one, because it is far from obvious *vis-à-vis* whom there is a duty of non-recognition.

<sup>2</sup> See O'Connell, *op. cit.* (above, p. 3 n. 6), p. 116, or Baxter, *Syracuse Law Review*, 16 (1965), p. 745 at p. 750, who speaks of the 'sanction of nullity'; Brownlie, *op. cit.* (above, p. 3 n. 6), p. 448, who says that 'to achieve the object of reparation tribunals may give "legal restitution" in the form of a declaration' of invalidity. And see Verdross and Simma, *op. cit.* (below, n. 7).

<sup>3</sup> *Recueil des cours*, 74 (1949-I), p. 237; but see the same author in *Traité de droit international public*, 2nd edn. (1967), vol. 1, p. 67. For the important award of 19 January 1977, see below, p. 65.

<sup>4</sup> *Reports of International Arbitral Awards*, vol. 2, p. 975, at p. 1002.

<sup>5</sup> Wengler, *op. cit.* (above, p. 3 n. 6) p. 571.

<sup>6</sup> *Recognition in International Law* (1947), p. 421.

<sup>7</sup> It is referred to in connection with nullity by Guggenheim, Jennings, Lauterpacht, *loc. cit.* (above, p. 5 n. 6), and by Verdross and Simma, *Universelles Völkerrecht* (1976), pp. 65, 244. Paul de Visscher, *loc. cit.* (above, p. 5 n. 6) rightly stresses that the 'mécanisme de nullité' is



little-known, illustration is provided by a diplomatic incident which occurred in September 1919:<sup>1</sup> Article 61 (2) of the German *Reich's* Weimar Constitution envisaged that Austria would delegate representatives to sit in the German Second Chamber (*Reichsrat*). The Allies regarded this as a violation of the Treaty of Versailles. In response to a demand made by them, Germany confirmed that all provisions of the Constitution which were inconsistent with the Treaty were 'invalid'. It would indeed be odd if a wrongful act were in law to be treated otherwise than as null and void. The analogy of municipal law would lend no support to such a conclusion: an act done in contravention of the law may have a variety of legal effects, but as a rule it cannot be the foundation of a valid legal title.

Thus in the *Eastern Greenland* case,<sup>2</sup> the Permanent Court of International Justice, having held the disputed area not to belong to Norway, proceeded to hold that the Royal Proclamation of 10 July 1931 whereby the Norwegian Government purported to occupy the area 'and any steps taken in this respect by that Government constitute a violation of the existing legal situation and are accordingly unlawful and invalid'. In the *Barcelona Traction* case<sup>3</sup> Judge Sir Gerald Fitzmaurice inquired whether the Spanish courts were entitled to render a judgment of bankruptcy against Barcelona Traction, a Canadian company without office, property or business activity in Spain. His conclusion was 'that the whole bankruptcy proceedings were, for excess of jurisdiction, internationally null and void *ab initio* and without effect on the international plane'. It is submitted that this represents sound law and should in no way be confined to cases of excess of jurisdiction. A slightly more troublesome position arose in the *Fisheries Jurisdiction* case<sup>4</sup> where the International Court of Justice held that certain Icelandic legislative acts 'are not opposable to the Government of the United Kingdom'. The relative nullity so pronounced was deliberate: the Court did not hold that the Icelandic legislation was, as suggested by the United Kingdom, 'invalid *erga omnes*', and for this reason a number of Judges, in a Joint Separate Opinion, felt it possible to concur.<sup>5</sup> The result is a little surprising, because previously it had been thought that a breach of customary international law or of a treaty was an international tort which produced absolute nullity. Both aspects were in issue, namely the United Kingdom's preferential fishing rights and the breach of a treaty of 1961.<sup>6</sup> The Court refrained from discussing the reasons for preferring the concept of relative nullity. It is not easy to discover a legally acceptable reason. The point which matters for present purposes is that the international wrong committed by Iceland led to some form of nullity of its legislation.

necessary to render the international legal order effective. On the principle see also Fitzmaurice, *Recueil des cours*, 92 (1957-II), p. 117 and Singapore Court of Appeal, I.L.R. 23 (1956), pp. 810, 831, 837.

<sup>1</sup> The incident is frequently described by German authors. See, e.g., Lais, *op. cit.* (above), p. 3 n. 6), pp. 30, 31.

<sup>2</sup> *P.C.I.J. Series A/B*, No. 53 (1933), p. 24.

<sup>3</sup> *I.C.J. Reports*, 1970, p. 106.

<sup>4</sup> *I.C.J. Reports*, 1974, p. 3, at p. 34.

<sup>5</sup> *Ibid.*, p. 46.

<sup>6</sup> See, in particular, p. 29 (paragraph 67).

The very opposite type of difficulty is created by the International Court's Advisory Opinion in the *Namibia (South West Africa)* case.<sup>1</sup> Having held that South Africa's Mandate over South West Africa had been terminated by the United Nations<sup>2</sup> and that *vis-à-vis* Members of the United Nations South Africa's presence in South West Africa was illegal, the Court proceeded to state that such termination and illegality 'are opposable to all States in the sense of barring *erga omnes* the legality of a situation which is maintained in violation of international law'.<sup>3</sup> It may be that in the particular case the view of the Court, especially the duty of non-recognition which it inferred from the absolute illegality, went very far.<sup>4</sup> Yet the general attitude towards the consequences of an international illegality which the Court contemplates is in line with what has been submitted to be the correct approach, and now constitutes the most authoritative and impressive statement of principle.

There are, on the other hand, cases of treaties in which States have found it necessary expressly to exclude nullity as a consequence of an international wrong, but exceptions may be said to prove the rule. Thus the European Convention for the Peaceful Settlement of Disputes<sup>5</sup> provides<sup>6</sup> that if the execution of the international tribunal's decision would conflict with a judgment or another measure put into effect by a party to the dispute and if the municipal law of such party precludes 'the consequences of the judgment or measure in question to be annulled', the international tribunal 'shall, if necessary, grant the injured party equitable satisfaction'. This is very much in line with a number of Treaties for Conciliation, Judicial Settlement and Arbitration concluded by Switzerland,<sup>7</sup> for instance the one with the United Kingdom,<sup>8</sup> which provides that if and in so far as annulment is impermissible, the international tribunal 'shall determine the nature or extent of the reparation to be awarded to the injured party'.<sup>9</sup>

3. Next it is necessary to turn to the distinct problem of the consequences of a *breach of treaty*. That such a breach, at any rate if it is substantial,<sup>10</sup> constitutes an international wrong and cannot simply be likened to a breach of contract is generally recognized<sup>11</sup> and is in line with the fact that even in private law a breach of contract is an unlawful act.<sup>12</sup>

<sup>1</sup> *I.C.J. Reports*, 1971, p. 16.

<sup>2</sup> On this basic point of the Opinion and the compelling doubts surrounding it see, in particular, Kewenig, *Festschrift für Ulrich Scheuner* (1973), p. 259.

<sup>3</sup> *I.C.J. Reports*, 1971, p. 56.

<sup>4</sup> Mann, *Festschrift für Ulrich Scheuner* (1973), p. 399, at pp. 414 sqq.

<sup>5</sup> *United Kingdom Treaty Series*, No. 10 (1961) (Cmnd. 1298).

<sup>6</sup> Art. 30.

<sup>7</sup> See Guggenheim, loc. cit. (above, p. 5 n. 6), p. 69 n. 1.

<sup>8</sup> *United Kingdom Treaty Series*, No. 42 (1967) (Cmnd. 3285).

<sup>9</sup> Art. 33.

<sup>10</sup> This qualification would seem to be obvious and hardly worth making.

<sup>11</sup> *Interpretation of Peace Treaties with Bulgaria etc.*, *I.C.J. Reports*, 1950, p. 228: 'It is clear that refusal to fulfil a treaty obligation involves international responsibility'. Or see, among many others, Oppenheim (ed. Lauterpacht), *International Law*, vol. 1, 8th edn. (1955), p. 339; Berber, *Lehrbuch des Völkerrechts*, 2nd edn. (1975), vol. 1, p. 505; Wengler, op. cit. (above, p. 3 n. 6), pp. 503, 504; Schüle (above, p. 3 n. 6), vol. 1, p. 330; Mosler, *Recueil des cours*, 140 (1974-IV), p. 172. In view of the decision of the International Court of Justice in the *Fisheries Jurisdiction* case, *I.C.J. Reports*, 1974, p. 3, the question arises whether the rule has not now been jeopardized. See above, p. 7.

<sup>12</sup> *Rookes v. Barnard*, [1964] A.C. 1129.



In the words of Lord McNair,<sup>1</sup> 'One point is clear: a breach by one party (including an unlawful denunciation) does not automatically terminate the treaty, for the other party may prefer to maintain it in existence.' Accordingly the breach confers upon the innocent party the *right* to terminate the treaty. It would be shocking if this view, which has frequently been expressed,<sup>2</sup> were not treated as compelling. If by a breach of a treaty a State could effectively put an end to it or force the other party to treat it as ended, one of the basic principles of international law and society and of law as a whole, viz. the principle of *pacta sunt servanda*,<sup>3</sup> would be undermined and destroyed, for one would be making the wholly irresponsible admission that by assuming an undischarged liability to pay damages the defaulting party could, against the wishes of the innocent party, terminate a treaty. No wonder, then, that so paradoxical a view has nowhere been put forward. It may be that the principle of the continuing validity of a treaty rests on a basis of considerable, perhaps even extreme, generality, but this is, surely one of the cases in which there is no room for qualifications or distinctions.

If it were necessary to look for support, it could be stated with certainty that the world's municipal systems of law are to the same effect. A material breach of the contract by the defaulting party does not discharge the contract, but provides the injured party with the option of accepting the repudiation (in which event both parties are discharged) or holding the defaulter to the contract and requiring its performance. Damages are payable in both cases, though their nature and extent will depend on how the option is exercised. No legal system has become known which, whatever phraseology or techniques it may employ, does not in substance and in the result correspond to the rule as stated in terms of the common law.<sup>4</sup>

In fact the existence of the rule in public international law which was stated already by Grotius and judicially applied for the first time in 1796 by the Supreme Court of the United States<sup>5</sup> and reaffirmed in 1913<sup>6</sup> is now implied in Article 60 of the Vienna Draft Convention on Treaties: 'A material breach of a bilateral treaty by one of the parties *entitles* the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or

<sup>1</sup> *Law of Treaties* (1961), p. 553.

<sup>2</sup> *Yearbook of the International Law Commission*, 1963, vol. 2, p. 204; Oppenheim (ed. Lauterpacht), op. cit. (above, p. 4 n. 7), p. 947; Brownlie, op. cit. (above, p. 3 n. 6), pp. 596, 597; Berber, op. cit. (above, p. 8 n. 11), p. 493; Clive Parry in Sørensen, *Manual of Public International Law*, p. 239; Verdross and Simma, *Universelles Völkerrecht* (1976), pp. 409, 410; Verzijl, *International Law in Historical Perspective*, vol. 6 (1973), p. 338; Dahm, op. cit. (above, p. 3 n. 6), vol. 3, p. 137.

<sup>3</sup> Now recognized by Art. 26 of the Vienna Draft Convention.

<sup>4</sup> As to English and Scottish law, in particular, see *White and Carter (Councils) Ltd. v. McGregor*, [1962] A.C. 413.

<sup>5</sup> *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796).

<sup>6</sup> In *Charlton v. Kelly*, 229 U.S. 447 (1913), at p. 473, the Court said in relation to the possible violation of a treaty by Italy that this would justify the United States in denouncing the treaty. The Court continued: 'If the United States elected not to declare its abrogation so as to come to a rupture, *it would remain in force*. It was only voidable, not void; and if the United States should prefer it might waive any breach' (italics supplied).

in part.' This implies that the injured State, if it does not exercise its entitlement to terminate the treaty, rightfully holds the wrongdoer to the treaty. To suggest that Article 60 does not do more than authorize and require a formal declaration to the effect that performance by the injured party will come to an end is a proposition inconsistent with the wording of the Article, the clear option it presupposes and the effect of the acceptance of a repudiation, namely the release of both parties from the duty of performance. Nor is it possible to subscribe to the view that the injured party 'must make up his mind within a reasonable time, otherwise he will lose his right to abrogate the treaty'.<sup>1</sup> If there is a single act which once and for all constitutes the breach of a treaty, such as the sinking of a ship, it may well be that even after protest the right to accept the repudiation is lost as a result of estoppel, acquiescence, delay or some similar legal principle. But if the wrong is a continuing one, if, for instance, the wrongdoer captures and holds the ship or occupies territory, there does not appear to be any good reason why the injured State which, so it is assumed, has expressed its protest should suffer any loss of rights while the illegality lasts.

As a matter of principle, therefore, it is an indubitable rule of law in general and of international law in particular that a treaty fundamentally broken or abrogated by one party continues in force and is to be performed indefinitely by the defaulting party until the innocent party elects to declare it terminated.

4. It is against the background of the substantive law thus far expounded that it becomes possible to consider the *remedies* which international law permits the innocent party to exercise. In this connection it is particularly necessary to guard against unchecked generalizations, for by their *compromis* the parties may agree upon particular forms of remedy. The resulting decision, while often useful as an example, does not lend itself to the formulation of a widely applicable rule; nor does the absence of cases in which a particular remedy was applied for or used prove that in suitable circumstances it would not be available. Much, perhaps everything, depends on the terms of the claimant State's application, though the decision eventually pronounced by the tribunal will rest on the exercise of its own discretion: the tribunal cannot go beyond the terms of the application, but is not compelled to grant relief in the very terms requested or suggested by the claimant.

The most usual remedy is undoubtedly *declaratory* relief. International decisions ordinarily are 'not imperative in tone'.<sup>2</sup> The reason or at any rate the theory is that declarations are less likely to offend the susceptibilities of States, that no question of enforceability in any event arises on the international level and that it may normally be taken for granted that even in the absence of a direct order States act in accordance with their legal duties once these have been declared by the tribunal to which they have submitted (or have been held to have submitted); the failure of highly civilized States to do so or even to submit argument showing why they should not do so is a very

<sup>1</sup> Lord McNair, *Law of Treaties* (1961), pp. 553, 571; Dahm, *op. cit.* (above, p. 3 n. 6), p. 138.

<sup>2</sup> Hudson, *International Tribunals* (1944), p. 120.

recent phenomenon which has done grave and most regrettable harm to the idea and the ideal of the pacific settlement of disputes, but, it is hoped, will not in the long term render the value of a declaratory judgment less cogent. Already forty years ago Judge Hudson said:<sup>1</sup>

In international jurisprudence, however, sanctions are of a different nature and they play a different role, with the result that a declaratory judgment will frequently have the same compulsive force as a mandatory judgment; States are disposed to respect the one not less than the other.

Similar views have frequently been expressed.<sup>2</sup> It is, therefore, the almost invariable practice of States to ask for a declaration designed to clarify the legal position and to lay the foundation for such additional claims for relief as may be necessary or expedient in order to work out more specific effects and implications of the declaration. This is what happened, for instance, in a striking fashion in the recent *Fisheries Jurisdiction* case.<sup>3</sup> While the United Kingdom, using a formula which by now has become traditional,<sup>4</sup> asked the Court to 'adjudge and declare' that as against the United Kingdom Iceland was 'not entitled unilaterally' to assert certain exclusive fisheries rights or to exclude British fishing vessels from certain areas,<sup>5</sup> the Court 'finds' for the United Kingdom and thus declares the parties' respective rights.<sup>6</sup> Nor is the power and the duty of an international tribunal to make a declaration in any way impaired by the extraordinary judgment of the International Court of Justice in the *Nuclear Tests* case,<sup>7</sup> which is the most recent of a series of disquieting decisions and may have done more than any other case to jeopardize the authority of the World Court. By an application dated 9 May 1973 Australia asked the Court 'to adjudge and declare that . . . the carrying out of further atmospheric nuclear weapon tests in the South Pacific Ocean is not consistent with applicable rules of international law'. Australia also asked for an order 'that the French Republic shall not carry out any further such tests'.<sup>8</sup> The oral argument was concluded on 11 July 1974.<sup>8</sup> The Court found that unilateral statements made by French authorities between 25 July and October 1974 (on which Australia was not heard)<sup>9</sup> and indicating an intention to discontinue atmospheric tests after the end of 1974 met the object of Australia's second claim and that Australia's first claim 'cannot be regarded as being a claim for a declaratory judgment', that such a judgment 'would be only a means to an end and not an end in itself' and that, so one reads with amazement, 'the present case is

<sup>1</sup> *Diversion of Water from the Meuse* case, P.C.I.J., Series A/B, No. 70, p. 79.

<sup>2</sup> In particular the statement was endorsed by the Joint Dissenting Opinion referred to below, p. 12 n. 2.

<sup>3</sup> I.C.J. Reports, 1974, p. 3.

<sup>4</sup> See the case referred to below, n. 7, at p. 263 (paragraph 30).

<sup>5</sup> I.C.J. Reports, 1974, p. 3 at p. 7.

<sup>6</sup> Ibid., at p. 34.

<sup>7</sup> I.C.J. Reports, 1974, p. 253.

<sup>8</sup> Ibid., at p. 256.

<sup>9</sup> It may be that this is one of the gravest aspects of the decision. Had it been a municipal case the fact mentioned in the text would have brought the decision within Art. 6 of the European Convention on Human Rights which guarantees the right to a 'fair hearing'.



not one in which such a declaratory judgment is *requested*.<sup>1</sup> That this was factually and legally 'untenable'<sup>2</sup> was convincingly shown by the Joint Dissenting Opinion of Judges Onyeama, Dillard, Jiménez De Aréchaga and Sir Humphrey Waldock and the further Dissenting Opinions of Judges De Castro and Sir Garfield Barwick. The Court gravely prejudiced, *inter alia*,<sup>3</sup> the usefulness of declarations: if a declaration so clearly requested is held not to have been requested on account of its allegedly subsidiary character one of the remedy's most useful functions is likely to suffer. Nor was there any basis for the assumption made by the Court, for in respect of the years 1973 and 1974 Australia did not obtain any measure of satisfaction, clarification or guidance. One can only express the hope that it is not necessary to infer from this remarkable incident that the Court has broken with its long practice<sup>4</sup> and that it will not in future fail to decide disputes between States by way of a declaratory judgment (however embarrassing the circumstances may be) or to attribute to such judgments the primacy which they have for so long enjoyed.

There is, however, another and more positive lesson which this judgment teaches. It seems to indicate and even to rest on the logical assumption that Australia was acting properly in making its second claim and that, accordingly, international law allows a State to claim and in a suitable case to obtain an order in the nature of a *negative injunction*. In fact Judge De Castro in his Dissenting Opinion spoke *obiter*<sup>5</sup> of Australia's right 'to ask the Court to uphold its claim that France should put an end to the deposit of radio-active fall-out on its territory'. Similar claims have frequently been made, apparently without objection, though even such claims are sometimes clothed in the form of a declaration. Thus in the *Case Concerning Right of Passage over Indian Territory*<sup>6</sup> Portugal asked the Court to 'adjudge and declare' that India must 'abstain from any act hampering or impeding' the alleged right of passage. Or a significant dictum by Judge Sir Gerald Fitzmaurice in the *Case concerning the Northern Cameroons*<sup>7</sup> illustrates the close interconnection between declaration and injunction:

Now it is in no way singular that an allegation that a breach of treaty has occurred should not be accompanied by any claim for compensation or other reparation, where the treaty is still in force and operating, for in that case any finding in favour of the plaintiff State functions as a prohibition on the continuance or repetition of the breach of treaty, and this may be all that is required, and in any event makes the judgment effective.

<sup>1</sup> *I.C.J. Reports*, 1974, p. 253 at p. 263 (italics supplied). The statement that no declaration had been requested is such that it is preferable to suppress any comment.

<sup>2</sup> *Ibid.*, at p. 312 (paragraph 3).

<sup>3</sup> For an excellent and moderate comment upon the decision see Kewenig, in *Recht im Dienst des Friedens* (Festschrift für Menzel, 1975), p. 323.

<sup>4</sup> A declaratory judgment has frequently been described as the 'normal' judgment asked for and given in international proceedings. See, e.g., Wengler, *op. cit.* (above, p. 3 n. 6), p. 720.

<sup>5</sup> *I.C.J. Reports*, 1974, p. 253 at p. 389. The value of the award in the *Trail Smelter* arbitration is, however, reduced as a result of Art. III of the Special Agreement between the United States of America and Canada, which conferred express powers upon the tribunal.

<sup>6</sup> *I.C.J. Reports*, 1960, p. 10.

<sup>7</sup> *I.C.J. Reports*, 1963, p. 98.

In the *Fisheries Jurisdiction* case<sup>1</sup> the United Kingdom again did not apply for an order restraining Iceland from excluding British fishing vessels from the area in question, but asked the Court to 'adjudge and declare . . . that Iceland is not entitled unilaterally to exclude British fishing vessels'. The difference in formulation does not involve a difference of substance in the field of international law where no judgment, howsoever it may be expressed, is capable of being compulsorily executed except possibly within the scope of Chapter VII of the Charter of the United Nations.

Nor is there, finally, any reason why an international tribunal should not render a *mandatory order*. Thus an order for payment—a very frequent type of order—was made against Germany,<sup>2</sup> an order that it 'must withdraw its customs line' was made against France,<sup>3</sup> Thailand was held to be 'under an obligation to restore to Cambodia' certain chattels.<sup>4</sup> Apart from the *Interhandel* case already referred to,<sup>5</sup> one can mention Liechtenstein which claimed that it be adjudged and declared that Guatemala 'should restore to Mr. Nottebohm all his property which they have seized and retained'.<sup>6</sup> There is also academic authority for the proposition that an international tribunal may order the doing of an act such as the evacuation of territory.<sup>7</sup>

Where the claimant State desires to enforce its treaty rights (and only in such a case),<sup>8</sup> the question arises whether the mandatory order may take the form of an order for *specific performance*. No actual example of such an order has been found, but there is no reason in logic or justice why such an order should not be made. That it cannot be enforced is no obstacle, for no order by an international tribunal can ever be enforced. Nor is it material that in the common law countries specific performance is not invariably granted by the courts. The refusal usually occurs where enforcement would be impracticable or difficult, but, as has just been pointed out, in the context of international law this is not a relevant point. Even in the common law countries the courts have become much less reluctant to grant specific performance; even the obligation to pay may now be ordered to be specifically performed.<sup>9</sup> In any case, ever since the fusion of law and equity in 1873 it was incorrect to suggest

<sup>1</sup> *I.C.J. Reports*, 1974, p. 7.

<sup>2</sup> *The Wimbledon, P.C.I.J.*, Series A, No. 1 (1923).

<sup>3</sup> *Case of the Free Zones of Upper Savoy and the District of Gex, P.C.I.J.*, Series A/B, No. 46 (1932), p. 172.

<sup>4</sup> *Case concerning the Temple of Preah Vihear, I.C.J. Reports*, 1962, p. 37.

<sup>5</sup> Above, p. 5 n. 1.

<sup>6</sup> *Nottebohm case, I.C.J. Reports*, 1955, p. 7. A curiously vague order was applied for by the United Kingdom in the *Anglo-Iranian Oil Co. case, I.C.J. Reports*, 1952, p. 93, at p. 96, when it asked the Court 'to adjudge that the Imperial Government of Iran should give full satisfaction and indemnity for all acts . . . which are contrary to international law or the aforesaid Convention, and to determine the manner of such satisfaction and indemnity'.

<sup>7</sup> Dahm, *Völkerrecht*, vol. 2 (1961), p. 540.

<sup>8</sup> It is very important to emphasize this. Much confusion has been caused as a result of use by some international lawyers of the phrase 'specific performance', when they mean restitution in kind. The two conceptions are entirely different. Specific performance is limited to the enforcement of contractual obligations. The confusion may be due to the fact that in order to describe the measure of damages the victim has frequently been said to be entitled to such sum as would afford him *restitutio in integrum*. See above, p. 3 n. 1.

<sup>9</sup> *Beswick v. Beswick*, [1968] A.C. 58.

that in the common law the structure of the contractual obligation was such as to imply no more than a duty to pay damages in case of breach; a somewhat dogmatic statement by Mr. Justice Oliver Wendell Holmes<sup>1</sup> has led to much misunderstanding on the Continent.<sup>2</sup> There is certainly nothing in the common law system that would compel an analogy to the effect that international tribunals cannot grant a mandatory order in the form of an order for specific performance.

5. Lastly it should be clear that the existence of an international wrong is to be distinguished from and is entirely independent of any procedural question to which the enforcement of the liability may give rise. Neither the absence of a tribunal having jurisdiction over the matter nor the claimant State's failure to proceed nor its decision not to exercise any remedies open to it nor its failure to afford diplomatic protection can affect the substance of the obligation and its breach. In particular, in the course of discussions about the exercise of the *jus standi* formulations may be found which suggest that the wrongdoing State's responsibility rests on the State of the victim's taking up the claim. But such formulations must be read in their context which usually did not require any emphasis upon the distinction which is here made and which is unlikely to meet with much opposition. It can in any event pray in aid a very clear and persuasive statement by Judge Sir Gerald Fitzmaurice, who said<sup>3</sup> that if a State acts illicitly

it stands in breach of international law irrespective of whether any other State is qualified to take the matter up. For instance, if an individual were concerned, he might be stateless. If in the present case there have been contraventions of international law, they are in no way legitimized nor do they become any the less illicit, because Canada has not (or even possibly could not) pursue the matter, and because Belgium is held to possess no *locus standi in judicio* for doing so.

This, it is believed, is sound law, for a wrong committed by the standards of objective law does not become a right by virtue of the impossibility of pursuit or unwillingness to pursue it.

## II. THE EFFECTS OF BREACHES OF CUSTOMARY INTERNATIONAL LAW BY THE FORUM STATE

1. As a matter of public international law it is free from doubt that, except in very special circumstances,<sup>4</sup> the rights accruing from an international wrong are vested in the victim State and lie against the wrongdoing State. Nor can such

<sup>1</sup> *The Common Law* (1882), p. 301; *Collected Papers*, p. 175.

<sup>2</sup> An early work by Rheininstein, *Die Struktur des verträglichen Schuldverhältnisses im anglo-amerikanischen Recht* (1932), has much contributed to the false impressions on the continent. For a good survey see Zweigert and Kötz, *Einführung in die Rechtsvergleichung*, vol. 2 (1969), pp. 162 sqq., and on the common law, pp. 177 sqq. Modern practice is illustrated, e.g., by *Evans Marshall & Co. Ltd. v. Bertola*, [1973] 1 W.L.R. 349, where a unanimous Court of Appeal granted an interlocutory injunction, although it was uncertain whether a permanent one would be granted, and specific performance would certainly have been denied.

<sup>3</sup> *Barcelona Traction Co. case*, I.C.J. Reports, 1970, at p. 66.

<sup>4</sup> The European Convention on Human Rights, with its remedy of individual petition, provides the principal exception.



rights be asserted otherwise than on the level of public international law, that is to say, in an international court or before an international arbitration tribunal. Does it follow that in municipal law an international tort is to be treated as non-existent and that a municipal court or arbitrator cannot take cognizance of it? No unqualified answer is possible. A number of distinct aspects demand consideration.

The starting-point must be the lawyer's inclination and, indeed, his determination and duty to contribute to the pervasive influence of public international law and to secure its effectiveness. In pursuing this object municipal law, as history has proved, has an important role to play, for even if one disregards the academic, though morally attractive, monistic theory it would be most unfortunate if there arose a wide discrepancy between public international and municipal law. A cleavage cannot at the present stage of development be avoided altogether. Yet it can, and ought to be, reduced to the greatest possible extent by using domestic legal systems as an instrument in extending the scope and cementing the effectiveness of public international law. Admittedly such a tendency, demanded by the highest interests of the law and its supremacy, has in recent years been exposed to considerable strain. In far too many cases public international law has been flagrantly violated or proved powerless; international legal institutions, in particular the International Court of Justice, have frequently, for the sake of expediency, failed to live up to their responsibilities; academic lawyers, in the name of realism, have decried the creative tradition of the practice of municipal courts;<sup>1</sup> domestic lawyers have become sceptical of the effectiveness, the precision, the guiding force and even the value of public international law; for a period of more than a dozen years, now perhaps approaching its end, one of the most authoritative and enlightened tribunals in the world, the Supreme Court of the United States, had caused that high-mindedness and idealism which is necessary for the implementation of public international law by municipal courts to be paralysed and undermined.<sup>2</sup> Yet the scholar as well as the practitioner, particularly the municipal judge, must not at any time allow his temporary disillusionment to overshadow the ultimate unity of the law. To put it differently,

<sup>1</sup> The most unfortunate and at the same time the work which in the United States of America has proved most influential is Falk, *The Role of Domestic Courts in the International Legal Order* (1964) on which see Mann, this *Year Book*, 40 (1964), p. 399.

<sup>2</sup> This is the result of *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), on which see Mann, *Virginia Law Review*, 51 (1965), p. 604 or *Studies in International Law* (1973), p. 466. A change has been brought about by the Hickenlooper Amendment, s. 620(e) (1) of the Foreign Assistance Act 1961, by the decision in *Alfred Dunhill of London Inc. v. Republic of Cuba*, 425 U.S. 682 (1976), and, most strongly, by the letter from the Legal Adviser to the Department of State of 26 November 1975 (*International Legal Materials*, 15 (1976), pp. 164-6 or *Digest of U.S. Practice in International Law*, 1975, pp. 372-5) which concludes as follows: 'In general this Department's experience provides little support for a presumption that adjudication of acts of foreign States in accordance with relevant principles of international law would embarrass the conduct of foreign policy. Thus, it is our view that if the Court should decide to overrule the holding in *Sabbatino* so that acts of State would thereafter be subject to adjudication in American courts under international law, we would not anticipate embarrassment to the conduct of the foreign policy of the United States'. Such a statement, supported as it is by common sense and sound law, would seem entirely to remove the 'underpinnings' of the Act of State doctrine. And see below, p. 30 n. 2.

he must always remember and put into effect the aim of establishing the greatest possible harmony between public international and municipal law. To compel the municipal judge to commit or sanction an international wrong or, conversely, to force the international judge to reach a decision inconsistent with an established body of municipal law—these would be consequences which every inspired lawyer will strive to avoid as much as possible.

By the nature of things the (relative) harmony between the international and the municipal legal order can, in the sphere of State responsibility, be achieved only in so far as the nullity of the internationally wrongful act is concerned. Monetary compensation lies outside the reach of a municipal court. So does restitution in kind in the strict sense. But nullity, as has been shown, acknowledges the continued existence of the *status quo* and is, therefore, a type of *restitutio in integrum*. It exists *erga omnes*. Hence it should, in principle, be fully cognizable by municipal courts, though the circumstances in which such recognition is appropriate need definition. At the same time it must again be emphasized that it is only a legal act as opposed to a set of facts that is capable of being struck down by nullity. Hence the international lawyer cannot complain of the universal practice of municipal courts<sup>1</sup> to proceed against an offender who had been illegally seized in foreign territory; the seizure is a fact against which the foreign State may have a just cause of complaint or which it may waive,<sup>2</sup> but which cannot be a nullity so as to deprive the forum of jurisdiction over a person in its actual control. Similarly the seizure of a ship in neutral waters is a fact so that the captor's prize court has jurisdiction over it, though the neutral State whose territorial sovereignty was infringed has a right to restitution in kind; on this point, therefore, the Anglo-American practice<sup>3</sup> would seem to be unobjectionable, while the continental practice,<sup>4</sup> based on the alleged 'nullity' of the capture, rests on faulty legal analysis.<sup>5</sup> International law is in these respects in harmony with municipal practice: thus if a party to proceedings has illegally obtained a document, this is a fact which does not render the document inadmissible in evidence.<sup>6</sup>

The delimitation of the boundaries of nullity, then, is the task to which it is

<sup>1</sup> For a comprehensive review see the decision of 29 May 1962 by the Supreme Court of Israel in *Eichmann's case*, I.L.R. 36, pp. 57 sqq., where all the law up to 1962 is discussed; on this case see the literature referred to by O'Connell, *International Law*, 2nd edn. (1970), p. 833 n. 3. Since then, in the same sense, *Argoud's case* decided by Cass. Crim., 4 June 1964, *Clunet*, 1965, pp. 93, on which see Doebling, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 25 (1965), p. 209; see also pp. 295–300 where the attitude of the German Government is set forth.

<sup>2</sup> As Argentina eventually did in *Eichmann's case*, though Germany might have had a claim to restitution: see Mann, *Studies in International Law*, pp. 113, 114.

<sup>3</sup> As to the United Kingdom see, e.g., *The Düsseldorf*, [1920] A.C. 1034, or *The Pellworm*, [1922] 1 A.C. 292. As to the United States see, e.g., *The Sir William Peel*, 5 Wall. 517 (1867).

<sup>4</sup> On it see O'Connell, *International Law*, 2nd edn. (1970), p. 836 or Morgenstern, this *Year Book*, 29 (1952), p. 265, at p. 274, whose observations on this aspect of the law merit close study.

<sup>5</sup> It is necessary to invoke first principles: possession is a fact. Its acquisition cannot be either valid or invalid. Even the thief has possession. On all this see, for instance, M. Wolff-Raiser, *Sachenrecht*, 10th edn. (1957), pp. 40, 59.

<sup>6</sup> *Kuruma v. The Queen*, [1955] A.C. 197; *Lord Ashburton v. Pape*, [1913] 2 Ch. 469; and see Phipson on *Evidence*, 11th edn. (1970), section 584. The question whether there are countries in which the rule is different cannot be pursued in the present context.



necessary to turn and which cannot be discharged without making a fundamental distinction between the consequences of an international wrong committed by the State of the forum and that committed by a State foreign to the forum. The former depend on the force which the constitutional law of the forum allows public international law to exercise over its own law. Accordingly it becomes necessary to distinguish between the status of customary and the status of conventional international law within the municipal system—in each case exclusively for the purpose, not of forming, developing or adapting a rule of municipal law, but of examining whether and to what extent both branches of international law or either of them can prevail over and nullify emanations of municipal law violative of it.

2. As regards customary international law there is no doubt that it was England that gave impetus to the idea of the municipal application of international law, and English law might have taken such a course as to confer supremacy upon the latter. The eighteenth century produced a number of cases<sup>1</sup> which in 1765 Blackstone summarized by the famous statement:<sup>2</sup>

The law of nations (whenever any question arises which is properly the object of its jurisdiction) is here adopted in its full extent by the common law of the land.

This could have meant that public international law was not only directly applicable, but also conclusive in England except that even at that time it probably could not invalidate an Act of Parliament. During the following two hundred years many lofty pronouncements were made which pointed in the same direction, and some high-minded scholars<sup>3</sup> attempted to assert and preserve the supremacy of international law; in fact to this day many continental observers are prone to represent English law as if the spirit of 1765 were still alive.<sup>4</sup> The truth is that the development was quite different and, as some may think, retrograde. It was succinctly summarized in a sentence for which Wynn-Parry J. bore responsibility and which deserves being saved from falling into oblivion:<sup>5</sup> 'The weight of modern authority regards those customary rules as part of English law only in so far as they have been adopted and made part of the law of England by legislation, judicial decision or established usage.' To put it differently, there does not appear to be any evidence at all in support of the suggestion that a British legislative, executive or judicial act, valid under British law, could ever

<sup>1</sup> *Barbuit's case* (1737), Cas. temp. Talbot 281; *Triquet v. Bath* (1764), 3 Burr. 1478—a case decided by Lord Mansfield and argued by Blackstone; *Heathfield v. Chilton* (1767), 4 Burr. 2015.

<sup>2</sup> *Commentaries*, vol. 4, chapter 5.

<sup>3</sup> Notably Sir Hersch Lauterpacht, *Transactions of the Grotius Society*, 25 (1939), p. 51 or *Collected Papers*, vol. 1 (1970), p. 154.

<sup>4</sup> See, e.g., Guggenheim, *Traité de droit international public*, 2nd edn. (1967), p. 70: 'L'application immédiate du droit international coutumier est assurée [*sic*] surtout dans les ordres juridiques anglo-saxons.'

<sup>5</sup> Halsbury (ed. Simonds), *Laws of England*, 3rd edn., title: 'Conflict of Laws', p. 4. The passage does not appear in the current, fourth, edition. The most recent example of a judicial statement of the law is *R. v. Secretary of State for the Home Department, ex parte Thakrar*, [1974] Q.B. 684, at p. 701 *per* Lord Denning, p. 709 *per* Lawton, L. J. But see now Lord Denning in *Trendtex Trading Corporation Ltd. v. Central Bank of Nigeria*, [1977] 1 All E.R. 881, at p. 889, a case which is under appeal to the House of Lords. It remains to be seen whether English law will revert to Lord Mansfield's doctrine.

be null and void on the ground of being contrary to customary international law or that a British court could refuse to apply it. And today this is by no means a peculiar characteristic of British law, for the position is the same in many other countries,<sup>1</sup> particularly the United States of America<sup>2</sup> and France, in regard to which a recent survey proved that the French judge, 'serviteur de la loi, il ne se reconnaît en aucune hypothèse le pouvoir de faire prévaloir le droit international . . . sur une règle ayant une valeur législative'.<sup>3</sup>

Notwithstanding its very liberal beginnings, the law of the United Kingdom thus ended up by accepting the principle which in 1919 the German *Reich's* Weimar Constitution formulated in its Article 4 and according to which the 'generally recognized' rules of public international law were binding in Germany. This expression, which still governs in the German Democratic Republic<sup>4</sup> and which found its way, though probably with a different connotation, into the Constitutions of Austria<sup>5</sup> and Italy,<sup>6</sup> was understood to mean that nothing could be generally recognized that was not recognized by the *Reich*, and that therefore the *Reich* decided upon the controlling influence of international law. Thirty years later, in 1949, Article 25 of the Basic Law of the Federal Republic of Germany opened the door wide, and perhaps more widely than elsewhere, to public international law by providing: 'The general rules of public international law shall be an integral part of federal law. They shall take precedence over the laws and shall directly create rights and duties for the inhabitants of the federal territory.' Two points require emphasis. First, the general rules of public international law are automatically incorporated into German law, irrespective of recognition by the Federal Republic. Secondly, they take precedence over

<sup>1</sup> See, for instance, High Court of Australia in *Polites v. Commonwealth*, (1945) 70 C.L.R. 6 or *Annual Digest*, 12 (1943-5), p. 208, or Supreme Court of Israel, 19 July 1951, in *Steinberg v. Attorney-General*, I.L.R. 18 (1951), p. 10.

<sup>2</sup> The principle that international law forms part of the law of the United States is stated with particular clarity in *The Paquete Habana*, 175 U.S. 677 (1900), at p. 700, where Mr. Justice Gray also states the exception when he inserted the words: 'where there is no treaty and no controlling executive or legislative act or judicial decision'. See also *The Over The Top*, 5 F. 2d. 838 (1925).

<sup>3</sup> Dubois, p. 77 in *L'Application du droit international par le juge français* (Paris, 1972). The only decision by a supreme tribunal which is directly relevant is Cass. Crim., 4 June 1964, *Chunet*, 1965, 93 (*Re Argoud*), where the Cour de Cassation approved the lower court's decision that an indictment could not be null and void on the ground of a violation of German sovereignty committed by the abduction of the accused.

<sup>4</sup> Berber, *Lehrbuch des Völkerrechts*, 2nd edn., vol. 1 (1975), p. 100.

<sup>5</sup> According to Article 9 of the Austrian Constitution 'the generally recognized rules of international law are held to be integral parts of the federal law'. According to the Constitutional Court, 24 June 1954, I.L.R. 21 (1954), p. 212, the generally recognized rules of international law are incorporated into Austrian law as ordinary federal law. They do not have the quality of constitutional law. Therefore a statute inconsistent with international law cannot be held to be unconstitutional and, therefore, invalid.

<sup>6</sup> Article 10 (1) of the Constitution of 1948 reads as follows: 'The Italian legal system conforms to the generally recognized principles of international law'. For a survey of Italian law see O'Connell, *International Law*, 2nd edn. (1970), p. 68 or Oellers-Frahm, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 34 (1974), p. 330. It seems to be accepted that the words 'generally recognized' do not require universality (*ibid.*, p. 334), but those principles seem to have the standing of a constitutional provision (*ibid.*, p. 341). A number of the decisions of the Italian Supreme Court holding the Hague Regulations to be part of customary international law and, therefore, of Italian law are to be found in I.L.R. 17 (1950), p. 419; 18 (1951), pp. 621, 681, 690.



pre-existing German law (with the exception of constitutional law)<sup>1</sup> and a statute expressly abrogating or inconsistent with them or any one of them would in substance be invalid.<sup>2</sup> No case seems to have occurred in which German law was found to be contrary to customary public international law and for this reason excluded from application. But many judicial *dicta* disclose that German courts are very conscious of the effect of Article 25. On the other hand the Federal Constitutional Court decided four years before the Vienna Draft Convention on the Law of Treaties<sup>3</sup> that, except in so far as peremptory norms were concerned,<sup>4</sup> customary international law was *jus dispositivum* in the sense that it could be displaced by a treaty to which the Federal Republic is a party.<sup>5</sup> The question whether a treaty concluded by other States can deprive a rule of public international law of the generality of its character has not been decided and is probably a matter of degree, the reference of the Basic Law being to general rather than universal rules.

The conclusion is that, though to a greater or lesser extent the rules of public international law are almost everywhere directly applicable,<sup>6</sup> it is not in many countries that a measure, lawful under the law of the forum, is liable to be held ineffective in the forum on the ground of its inconsistency with customary international law.

### III. THE EFFECTS OF BREACHES OF TREATY OBLIGATIONS BY THE FORUM STATE

When one comes to deal with the municipal effects of the violation of treaty obligations assumed by the forum, one cannot help noticing a livelier, speedier

<sup>1</sup> That the general rules of international law have only the status or quality of general law as opposed to constitutional law seems to be the better opinion: see, e.g. *BVerfGE*, 6, 309, 363; 37, 271, 279; *Bonner Kommentar*, Art. 25 note 3; Hamann, *Grundgesetz*, 3rd edn. (1970), Art. 25, note 3; Maunz-Dürig, Art. 25, note 25.

<sup>2</sup> The Federal Constitutional Court avoids the word 'invalidity', but prefers to speak of the general rules of international law breaking or superseding inconsistent municipal law: *BVerfGE*, 6, 309, 363; 23, 288, 316; 36, 342, 365. But it is unlikely that more than a terminological question is involved. A recent decision of the Federal Supreme Court explains wholly accurately that in the event of an inconsistency between international law and German municipal law the latter 'withdraws', but does not become contrary to Art. 25 or unconstitutional: 20 October 1976, *Juristenzeitung*, 1977, p. 67, at p. 68. However it is put, inconsistent German law is inapplicable.

<sup>3</sup> See its Art. 53. The text is to be found, e.g., in *American Journal of International Law*, 63 (1969), p. 875.

<sup>4</sup> The Court defined them as follows: 'Only some elementary legal commands will have to be considered as rules of customary international law which do not permit contracting out. The quality of such peremptory norms can be attributed only to those legal rules which are firmly embedded in the legal conscience of the community of States, which are indispensable to the existence of public international law as an international legal system and the observance of which may be demanded by all members of the community of States.'

<sup>5</sup> 7 April 1965, *BVerfGE*, 18, 441, at p. 448, or *Archiv des Völkerrechts*, 13 (1966/7), p. 122, at p. 126. The decision, on which see Riesenfeld, *American Journal of International Law*, 60 (1966), p. 511, affirms Federal Finance Tribunal, 1 March 1963, *BStBl.* 1963, 3, p. 300 or *Archiv des Völkerrechts*, 11 (1963/4), p. 246, also I.L.R. 44, p. 149.

<sup>6</sup> As to Switzerland see Guggenheim, *Traité de droit international public*, 2nd edn. (1967), p. 73 with reference to cases in n. 4. In Austria public international law has the status of federal law and can therefore be overridden by inconsistent legislation: Constitutional Court, 24 June 1954, I.L.R. 21 (1954), p. 212.

and sometimes almost sensational development of constitutional (not international) law which owes much to the impact of the Treaty establishing the European Economic Community.<sup>1</sup>

Three principal sets of fact have to be distinguished.

1. There is, first, the case of the treaty which is binding in public international law upon the State of the forum, but which has not been incorporated into its municipal legal system. The failure to transform the treaty into municipal law will invariably constitute a serious international illegality. But, although in accordance with their general practice municipal courts will usually try so to interpret their municipal law as to avoid a conflict, and there is a presumption in favour of the legislature's intention to observe international law,<sup>2</sup> they are bound to apply the municipal law as they find it, and if this does not include the treaty they can do nothing about it.

It must unfortunately be stated that conflicts of this kind have arisen in the United Kingdom with an alarming frequency. Perhaps the most prominent example is the European Convention on Human Rights which has never been made part of English law. The omission seems to be due to the wholly untenable belief that incorporation was unnecessary because English law was in conformity with the Convention;<sup>3</sup> if that illusion was not shattered earlier, it surely must have been exploded by the decision of the European Court of Human Rights in *Golder's* case,<sup>4</sup> which, notwithstanding its obvious fallacy,<sup>5</sup> must have created much embarrassment for the United Kingdom (as well as many other countries). While the failure to transform into English law the Agreement on German External Debts made in London in February 1953<sup>6</sup> did not in England lead to any litigation of a possibly unworthy character, the same cannot be said of the case of *Administrator of German Property v. Knoop*,<sup>7</sup> where the judge had to apply English law knowing it to be contrary to a treaty, or of the circumstances which led to the probably even more invidious decision in *Republic of Italy v.*

<sup>1</sup> On the law discussed in this section see the discussion and the collection of material by Kaye Holloway, *Modern Trends in Treaty Law* (1967), pp. 151 sqq. and Michel Waelbroeck, *Traités internationaux et juridictions internes* (1969), an excellent work, though unfortunately to some extent already superseded by events; O'Connell, *op. cit.* (above, p. 3 n. 6), pp. 56 sqq.; Berber, *op. cit.* (above, p. 3 n. 6), pp. 96 sqq.

<sup>2</sup> Maxwell, *Interpretation of Statutes*, 12th edn. (1969), pp. 183 sqq. As to the United States, the law goes back to Chief Justice Marshall in *Murray v. Schooner Charming Betsy*, 2 Cranch (6 U.S.) 64 (1804), at p. 118. For a more recent case see, e.g., *MacLeod v. U.S.*, 229 U.S. 416 (1913), at p. 434 *per* Mr. Justice Day. As to Germany see Maunz-Dürig, Art. 25 note 30, and Verdross and Simma, *Universelles Völkerrecht* (1976), p. 437.

<sup>3</sup> Sir Francis Vallat, *International Law and the Practitioner* (1966), p. 12.

<sup>4</sup> Not yet reported.

<sup>5</sup> It was held that if a prisoner in an English prison believes he has been libelled in October 1969 and is due for release in July 1972, and if in April 1970 he is not given an opportunity to consult a solicitor about possible proceedings for damages for libel (which he could, but does not, institute on release), he has 'in the determination of his civil rights' been deprived of his entitlement 'to a fair and public hearing within a reasonable time' in the sense of Article 6 of the Convention. Quite apart from the extraordinary construction placed on Article 6, the elevation of the 'right' of a prisoner to consult a lawyer at will to a human right can only be noted with astonishment.

<sup>6</sup> *United Kingdom Treaty Series*, No. 7 (1959) (Cmd. 626).

<sup>7</sup> [1933] Ch. 439.



*Hambros Bank*,<sup>1</sup> where the Republic of Italy unsuccessfully tried to prevent an attempt of the Crown, by its agent, the Custodian of Enemy Property, to break a treaty made by it. To this day neither an explanation nor an excuse seems to have been proffered. The most serious, because the most authoritative, judicial breach of a treaty committed as a result of the omission of incorporation occurred through the decision of the House of Lords in *Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G.*,<sup>2</sup> a decision which has so far failed to attract the close attention of public international lawyers which it merits. In 1960 the United Kingdom and the Federal Republic of Germany entered into a Convention for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters.<sup>3</sup> It provided, *inter alia*, that a judgment entitled to recognition 'shall be treated as conclusive as to the matter thereby adjudicated upon in any further action between the parties . . . and as to such matter shall constitute a defence in any further action between them in respect of the same cause of action'.<sup>4</sup> Further, recognition 'shall not be refused merely on the ground that the original court has applied, in the choice of the system of law applicable to the case, rules of private international law different from those observed by the court or authority applied to'.<sup>5</sup> An action was dismissed by the District Court of Munich. The reason was that the claim was statute-barred under German law which, in the view of the court, was applicable. The majority of the House of Lords (Viscount Dilhorne, Lord Wilberforce and Lord Simon of Glaisdale)<sup>6</sup> held that, since the German judgment was based upon what English law regarded as a procedural matter it was not 'conclusive' and therefore not entitled to recognition under Section 8 of the Foreign Judgments (Reciprocal Enforcement) Act 1933. The Convention, not having been made part of English law, was not applied. In the course of a powerful dissenting opinion Lord Diplock wisely invoked the text of the Convention (which had been settled long before 1960 and, indeed, before 1933) as well as the material preceding it, for<sup>7</sup>

where an Act of Parliament is passed to enable or to require United Kingdom courts to give effect to international obligations assumed by Her Majesty's Government under a treaty, it is a well-established rule of construction that any ambiguity in the words of the Act should be resolved in favour of ascribing to them a meaning which would result in the performance of those international obligations—not in their breach.

He found that the words 'question adjudicated upon' in the Convention threw light on the word 'conclusive' in the Act and referred to the actual decision, i.e., the operative part of the judgment, as opposed to the grounds or reasons supporting

<sup>1</sup> [1950] Ch. 314. On this case and on the case mentioned in the preceding note see Mann, *Studies in International Law*, pp. 351, 354, 356.

<sup>2</sup> [1975] A.C. 591. The comments on this case by Edler, *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 40 (1976), p. 43 do not deal with the point made in the text.

<sup>3</sup> See S.I. 1961, No. 1199.

<sup>4</sup> Article III (4).

<sup>5</sup> Article III (3).

<sup>6</sup> Lord Reid was of the opinion that the Act of 1933 did not apply at all in regard to foreign judgments in favour of a defendant. It may be expected that this will remain an isolated view, though unfortunately it was not expressly rejected by the majority.

<sup>7</sup> pp. 640, 641. And see Lord Denning M.R. in *R. v. Chief Immigration Officer, ex parte Bibi*, [1976] 1 W.L.R. 979, at p. 984, and see above, p. 20 n. 2.

it. There can be no doubt that this interpretation corresponds to the German text of the Convention<sup>1</sup> and has in fact never given rise to any problem in Germany, where the Convention was adopted as part of the law, and the dismissal of the action in fact meant that the plaintiffs could not recover.<sup>2</sup> By looking at the reasons for the result reached by the German court and interpreting them in the English rather than the German sense, i.e., by treating them as procedural rather than substantive, the House of Lords, in the words of Lord Diplock, sanctioned a breach of the Convention, which, whether it could have been avoided by the judiciary or not, would almost certainly not have happened had the Convention been made part of English law. It remains a matter for regret, though perhaps not a matter of international responsibility, that the majority of the House of Lords did not avail itself of the opportunity of remedying a grave, albeit unintended, violation of international law by the United Kingdom.

In these circumstances it must be described as comforting that absence of transformation into domestic law occurs also abroad and is, therefore, not by any means a defect peculiar to the United Kingdom. Thus publication of treaties is the necessary and at the same time sufficient condition of their judicial application in France.<sup>3</sup> It appears that there are a number of cases in which treaties were not or were improperly published and for this reason excluded from application.<sup>4</sup> That States are liable to observe less than the strictest care in these matters is a surprising fact and calls for radical remedies.

2. A treaty, duly incorporated into the domestic legal system by legislative action, clearly prevails over pre-existing municipal law<sup>5</sup> even where the constitutional law of the forum does not include a clause such as Article VI clause 2 of the Constitution of the United States of America according to which treaties are the supreme law of the land, or Article 55 of the French Constitution of 1958 which provides that 'les traités ou accords régulièrement ratifiés ou approuvés ont, dès leur publication, une autorité supérieure à celle des lois'. Such treaties, expressly or by necessary implication, repeal the earlier municipal law which is inconsistent with them. The reason lies in the rule *lex posterior derogat priori*. It is not public international law as such that has the effect of setting aside the earlier inconsistent law. The question which the judiciary faces is purely one of construction. It is governed by the general rules of statutory interpretation, though in the United States of America it has been held that the earlier law will be treated as repealed only if the incompatibility is clear and not merely implied.<sup>6</sup>

<sup>1</sup> The German text has for the English word 'matter' the word '*Anspruch*' and is, therefore, much clearer.

<sup>2</sup> Curiously enough Viscount Dilhorne, using these very words, said that that was 'all that the German court decided': p. 626. What else could or should the German court have decided? If an action is dismissed, the plaintiff cannot recover. If he cannot recover, it is conclusively established that he does not have a cause of action.

<sup>3</sup> Article 55 of the Constitution of 1958.

<sup>4</sup> See on the subject Batiffol and Lagarde, *Droit international privé*, 6th edn. (1974), vol. 1, no. 36, in particular n. 53, with references.

<sup>5</sup> The question whether it also prevails over constitutional law is a distinct one and has not met with a uniform answer. It cannot be pursued in the present context.

<sup>6</sup> *Johnson v. Browne*, 205 U.S. 309, 321 (1907). On Italy, see now Constitutional Court, 14 July 1976, *Europarecht*, 1977, p. 171.



3. A much more difficult problem arises in the converse case of the incompatibility between a duly incorporated treaty and a subsequent inconsistent statute. Everywhere the courts have gone far to adopt a process of construction which will avoid such a clash,<sup>1</sup> and in the United States of America it has even been held that for a later statute to prevail over an earlier treaty the legislator's intention must be clearly expressed and in the absence of such expression the presumption against implied repeals of treaty law controls.<sup>2</sup> The position is similar in France where the leading formulation of the principle is to be found in the submissions of the celebrated Procureur Général Matter in 1931, who said that there exists 'en quelque sorte une présomption que la loi n'a pas voulu empiéter sur le traité et cette présomption ne peut être détruite que par une déclaration formelle de la loi'.<sup>3</sup> Thus, even before and independently of Article 55 above referred to, the supreme tribunals of France adopted a firm practice<sup>4</sup> which, more particularly, led to the rule that, where the earlier treaty conferred a benefit upon a foreigner, the later statute 'réserve nécessairement le cas où l'étranger peut invoquer une convention internationale'<sup>5</sup>—a rule which very recently was affirmed by the Conseil d'État in spectacular circumstances:<sup>6</sup> even where the statute specifies the categories of foreigners entitled to the benefits which it grants, such a provision 'ne saurait être compris comme ayant eu pour effet d'en exclure les étrangers, même non visés par le décret du 4 septembre 1962, qui sont à même de se prévaloir d'une convention internationale'. Nothing less than an express exclusion by the new law of those covered by the earlier treaty is sufficient.

It is with regret that one notices the different and somewhat cavalier manner in which in recent years English courts have approached the problem. Although the starting-point is a rule which is similar to, though much less strongly formulated than, the French counterpart, the practice displays a striking cleavage. In *Collco Dealings Ltd. v. Inland Revenue Commissioners*<sup>7</sup> an Anglo-Irish Agreement of 1926, duly adopted by English legislation, provided for the exemption from certain British taxation of residents of Eire. In 1955 an English statute imposed tax on 'a person entitled under any enactment to an exemption from income tax'. The plaintiff, a company resident in Eire, was assessed to tax under the last-

<sup>1</sup> As to Germany see the references by Klaus Vogel, *Der räumliche Anwendungsbereich der Verwaltungsrechtsnormen* (1965), pp. 398, 399, and see below, n. 5. As to Austria see the references by Binder, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 35 (1975), p. 299 n. 75, and, generally, see above, p. 19 n. 2.

<sup>2</sup> This goes back to Marshall C.J. in *The Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804), and has frequently been reaffirmed. See *Chew Heong v. U.S.*, 112 U.S. 536 (1884); *U.S. v. Payne*, 264 U.S. 446 (1924); *Cook v. U.S.*, 288 U.S. 102 (1933); *Moser v. U.S.*, 341 U.S. 41, 45 (1951).

<sup>3</sup> Cass. Civ., 22 December 1931, *Clunet*, 1932, p. 687 with the submissions of M. Matter, also S. 1932, 1. 257. The principle is generally accepted.

<sup>4</sup> See the cases collected, e.g., by Batiffol-Lagarde, op. cit. (above, p. 22 n. 4), no. 39, n. 69.

<sup>5</sup> Cass. Civ., 4 February 1936, S. 1936, 1. 257. On one occasion a German Court, the Supreme Finance Court, *RFH* 3, 10 (14), in effect took a similar course by treating a treaty as *lex specialis* in relation to a subsequent statute, so that, in the words of Vogel, op. cit. (above, n. 1), *lex generalis posterior non derogat legi priori speciali*.

<sup>6</sup> 25 July 1975, *Revue critique de droit international privé*, 1976, p. 60, with note by Valticos.

<sup>7</sup> [1962] A.C.1.

mentioned provision, but claimed that on its true construction it ought not to be applied to persons who were entitled under an enactment which incorporated a treaty benefiting foreign residents into English law. The claim failed. The argument that a wide construction of the relevant phrase would be contrary to 'the comity of nations and the established rules of international law' involved to the mind of Viscount Simonds no more than 'high-sounding phrases', and to invoke the Agreement with Eire '(which the appellant company, to add weight to the argument, prefers to call a treaty)' for the purpose of disregarding 'the plain words of the statute' was 'an extravagance'.<sup>1</sup> Although the other members of the House (Lord Morton of Henryton, Lord Reid, Lord Radcliffe and Lord Guest) gave the plaintiff company's case equally short shrift, the decision is far from convincing. Generality of expression should be insufficient to impute to Parliament the intention to involve the United Kingdom in a plain breach of obligations arising from a treaty, for notwithstanding Lord Simonds's disdain no less than a treaty was in issue.<sup>2</sup> However general, however 'clear' the words of a statute may appear to be, there always is room for the question whether they are intended to apply to a case to which, as a matter of international law, they ought not to and, therefore, may not apply. If we are serious in our desire and object to avoid a breach of international law by the United Kingdom it is *nihil ad rem* simply to point to words which are sufficiently general and wide to comprise the uninviting result. Britain should not fail to adopt and give effect to the presumption which, for the discharge of their international duties, other countries have introduced into their law. It is very necessary to make this suggestion with respect yet with firmness, for in the House of Lords there were also remarks made to the effect that a breach of the treaty was a matter for the governments concerned, the implication being that the courts were at liberty to decide what they thought right.<sup>3</sup> Such a thought, it is submitted, indicates a dangerous road leading to the courts' being relieved of all restraint which international law and the danger of its violation may impose. It also disregards the rationale of the presumption or the rule which earlier generations accepted. This is to protect the nation against complaints by a foreign State. The restraint which international law expects the courts to observe is imposed, not in the interest of a litigant, but in the interest of the State of the forum. Scrutton L.J.,<sup>4</sup> it will be remembered, went so far as to state that to hold foreign legislation to be contrary to essential principles of justice and morality would be 'a serious breach of international comity' and possibly a *casus belli*. We now know that this surely was an exaggeration, wrong in law and rejected by many later cases. But the approach was soundly based in that the observance of international law, where its rules

<sup>1</sup> [1962] A.C. 1, pp. 18, 19.

<sup>2</sup> This was the legal position, irrespective of any designation used by the High Contracting Parties.

<sup>3</sup> This appears particularly clearly from the opinion of Lord Reid, p. 22: 'Although the infringement of a treaty may cause loss to individuals, the only person properly entitled to complain of such infringement is the other party to the treaty.' Yet Lord Reid also said: 'there is a presumption that Parliament did not intend to act contrary to the comity of nations'.

<sup>4</sup> *Luther v. Sagor*, [1921] 3 K.B. 532, 558, 559.



apply,<sup>1</sup> is required of judges no less than of other organs of the State in the interest of their sovereign who is bound by it.

Although courts should and usually will strive by a process of construction to avoid a conflict between a treaty and a later statute, there are likely to be cases in which a clash is inescapable. If this happens the attitude of the courts will again be determined by constitutional rather than international law. It depends on constitutional law whether precedence is accorded to the earlier treaty or the later inconsistent statute. Until a short time ago an answer in the latter sense was supported by almost universal practice in most countries, but the E.E.C. Treaty gave new impetus to the problem and its solution is undergoing remarkable changes. It is proposed to consider their effect on the general law and at the same time to ask whether the E.E.C. Treaty itself is to be dealt with differently.

In Germany and Italy it is widely accepted that, since the incorporated treaty has the rank of an ordinary statute, it can be modified or repealed by subsequent legislation, even though this is likely to involve an infringement of the earlier treaty;<sup>2</sup> in particular it is difficult to see how in either country a different rule should apply in relation to the E.E.C. Treaty, and in fact no court of final jurisdiction has as yet attributed any privileged status to it.<sup>3</sup> The only argument which could be put in both countries<sup>4</sup> and which is not by any means peculiar to the E.E.C. Treaty is to the effect that the rules of customary international law have overriding force and that, therefore, the question arises whether these rules could invalidate legislation inconsistent with an earlier treaty of any kind. This might be so if the rule *pacta sunt servanda* could be treated as a general rule of international law within the meaning of the constitutional provisions,<sup>5</sup> particularly if it were to be supplemented by another general rule, curiously enough invariably overlooked by those participating in the discussion, according to which 'a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force'.<sup>6</sup> Such an argument is usually rejected, though the arguments are not

<sup>1</sup> They did not apply in the case before Scrutton L.J., nor was there any rule of international law which could have precluded an English court from having resort to *ordre public*.

<sup>2</sup> Apart from the literature referred to above, p. 20 n. 1, see as to Germany, for instance, Maunz-Düring, Art. 25 note 29 and as to Italy Oellers-Frahm, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 34 (1974), p. 337.

<sup>3</sup> In both countries the Constitutional Court held that E.E.C. legislation is directly applicable, but that the fundamental rights guaranteed by the Constitution cannot be overridden by E.E.C. law—a most welcome decision which unfortunately has met with much criticism (see, e.g., Scheuner, *Archiv des öffentlichen Rechts*, 100 (1975), p. 30). In both countries the question whether subsequent national legislation can set E.E.C. law aside is unsettled. See Italian Constitutional Court, 27 December 1973, [1974] C.M.L.R. 372 and 30 October 1975, *Europarecht*, 1976, p. 246, and German Federal Constitutional Court, 29 May 1974, *BVerfGE*, 37, 272.

<sup>4</sup> In Germany one of the chief exponents of the idea that E.E.C. law prevails even over subsequent German legislation is Ipsen, *Europäisches Gemeinschaftsrecht* (1972), pp. 277–308.

<sup>5</sup> As mentioned above, Italian law speaks of generally recognized rules of international law, but this is not regarded as a form of qualification: Oellers-Frahm, loc. cit. (above, n. 2), p. 334.

<sup>6</sup> As to this principle see, generally, Brownlie, op. cit. (above, p. 3 n. 6), p. 37 or, for instance, Permanent Court of International Justice in *Exchange of Greek and Turkish Populations*, Series B, No. 10 (1925), p. 20; *Jurisdiction of the Courts of Danzig*, Series B, No. 15 (1928), pp. 26, 27; *Free Zones of Upper Savoy and the District of Gex*, Series A, No. 24 (1929), p. 12; *Greco-Bulgarian*

always convincing. Thus when it is said that the rule cannot turn conventional into customary international law<sup>1</sup> this misses the point, for it is the breach of the treaty which international law does not permit and which the constitutional rule precludes from prevailing. Or it is suggested that the rule is intended to secure the international commitment, not the domestic law of the State and applies, therefore, only among States.<sup>2</sup> The international rule, however, requires observance of the treaty. It may leave it to the State to decide how the international rule is to be implemented. But it undoubtedly does require the fact of observance and if constitutional law renders international law obligatory in domestic courts it comprises all such international law as is self-executing, irrespective of the fact that originally international law is addressed to States and their instrumentalities, including their courts. In sum, one cannot help being impressed by those German and Italian scholars<sup>3</sup> who submit that the constitutional requirement of the paramountcy of customary international law precludes the recognition of a statute which is contrary to an earlier treaty.

This is the result which recently was arrived at in the Netherlands, France, Belgium and, apparently, Luxembourg. In the two first-mentioned countries there was probably little cause for surprise, for in the Netherlands Article 66 of the Constitution of 1966 expressly provides that treaties duly adopted and published have precedence over domestic law, whether they be concluded before or after the latter came into force, and in France Article 55 of the Constitution of 1958 attributes 'une autorité supérieure à celle des lois' to treaties which have been duly ratified and published. It is true that, notwithstanding the width of the formulation, it was until a short time ago almost generally believed that a later statute had to be applied even if it was inconsistent with an earlier treaty.<sup>4</sup> As recently as 1972 Monsieur Ange Blondeau, then Advocate General, ventured to predict that 'aussi bien les Chambres civiles que les Chambres criminelles appliqueraient la loi', not the treaty, the reason being that a French court cannot examine the constitutional validity of a statute and, therefore, lacks 'le moyen de faire triompher le traité sur la loi postérieure manifestement contraire'.<sup>5</sup> Yet on 24 May 1975<sup>6</sup> the highly authoritative Chambre Mixte of the Cour de Cassation,

*Communities*, Series B, No. 17 (1930), p. 32. The two first-mentioned cases related to the failure to incorporate treaties into the municipal system of law.

<sup>1</sup> German Federal Constitutional Court, 9 June 1971, *BVerfGE*. 31, 145, at p. 178. On the problem see W. K. Geck, *Bundesverfassungsgericht und Grundgesetz* (Festgabe für das Bundesverfassungsgericht, 1976), p. 135.

<sup>2</sup> Berber, *op. cit.* (above, p. 3 n. 6), pp. 100, 101, with references to those holding opposite views, including a decision of the German Federal Supreme Court.

<sup>3</sup> In Italy in particular Quadri and his school. See Quadri, *Recueil des cours*, 113 (1964-III), pp. 304-7.

<sup>4</sup> Batiffol-Lagarde, *op. cit.* (above, p. 22 n. 4), no. 40.

<sup>5</sup> Reuter and others, *L'Application du droit international par le juge français*, p. 61.

<sup>6</sup> *Clunet*, 1975, p. 801, with note by Professor Ruzié who rightly emphasizes that the decision is not limited to E.E.C. law, but as a result of the express reference to Art. 55 of the Constitution 'implique, de la part de la Cour de Cassation, sa volonté de faire prévaloir n'importe quel traité ou accord, régulièrement ratifié ou approuvé, sur toute loi postérieure'. The decision is also reported in *Revue critique de droit international privé*, 1976, p. 347 with Note by Jacques Foyer and D. Holleaux and in [1975] *C.M.L.R.* 336, at p. 367 in English, at p. 377 in French. The



following the submission of the Procureur Général Touffait, confounded all expectations and in relation to the E.E.C. Treaty deduced from Article 55 of the Constitution the wholly general rule that a treaty 'a une autorité supérieure à celle des lois' and that consequently a provision of the treaty 'devrait être appliqué en l'espèce, à l'exclusion de l'article 265 du Code des Douanes, bien que ce dernier texte fut postérieur'.

If many French lawyers must have regarded this decision as startling, the development in Belgium was even more remarkable. Article 68 of the Belgian Constitution of 1831 provides no more than that treaties which bind individuals 'n'ont d'effet qu'après avoir reçu l'assentiment des Chambres'. Nevertheless, in a case involving the E.E.C. Treaty, but on entirely general grounds, the Belgian Cour de Cassation, in accordance with the submissions of its Procureur Général, held<sup>1</sup>

que la règle, d'après laquelle une loi abroge la loi antérieure dans la mesure où elle la contredit, est sans application au cas où le conflit oppose un traité et une loi; attendu que, lorsque le conflit existe entre une norme de droit interne et une norme de droit international qui a des effets directs dans l'ordre juridique interne, la règle établie par le traité doit prévaloir; que la prééminence de celle-ci résulte de la nature même du droit international conventionnel.

In view of the restricted scope of the constitutional provisions, the paucity of such reasoning as the Court advances is palpable rather than surprising and it remains to be seen how Belgian law will develop in years to come.

However this may be, it is hardly open to doubt that in other countries such as, in particular, the United States of America,<sup>2</sup> Switzerland<sup>3</sup> and the United Kingdom the later statute, in spite of its inconsistency with an earlier treaty, albeit

submissions by Monsieur Touffait had expressly requested the court (pp. 363, 364) not to invoke Art. 55, but to base the decision on the peculiarity of Community law. This the court refused to do.

<sup>1</sup> Cass. 21 May 1972, [1972] C.M.L.R. 330, at p. 375.

<sup>2</sup> See, generally with reference to numerous cases, Hyde, *International Law*, vol. 2 (1947), pp. 1463-5. See, in particular, the *Head Money* cases, 112 U.S. 580 (1884); *Whitney v. Robertson*, 124 U.S. 190 (1888); *U.S. v. Lee Yen Tai*, 185 U.S. 213 (1902).

<sup>3</sup> In view of the British practice to which reference has been made, Swiss law is particularly instructive. The leading case is the decision of the Federal Tribunal of 22 November 1968, *BGE*. 94 I 669. The question was whether a nineteenth-century treaty guaranteeing freedom of navigation on the Rhine to 'everyone' was made subject to the then existing Swiss postal monopoly or, alternatively, was repealed by a statute of 1924. Both questions were answered in the negative. As to the latter point it was stated as a principle of law (p. 678) 'that the federal legislator intends validly concluded treaties to remain effective, unless he expressly accepts that municipal law inconsistent with international law should come into existence. In case of doubt municipal law must be construed in conformity with international law'. It was found as a fact that the legislator of 1924 did not intend to create a state of affairs violating the treaty. In a decision of 2 March 1973, *BGE*. 99 Ib 39 (in Italian); *Annuaire suisse de droit international*, 1974, p. 110 (in French); *Praxis des Bundesgerichts*, 1973, no. 106, p. 291 (in German) the Tribunal affirmed the principle and added: 'En règle générale et en cas de conflit ouvert le principe en question reconnaît la primauté du droit international, que celui-ci soit antérieur ou postérieur à la règle de droit interne.' In view of the *travaux préparatoires*, however, the Tribunal found that in the case before it Parliament had in fact intended to override the treaty obligation. On this case see Wildhaber, *Annuaire suisse de droit international*, 1974, p. 195.

the E.E.C. Treaty, will prevail. As regards the United Kingdom<sup>1</sup> there is simply no legal basis which would enable any British court to disregard the will of Parliament as expressed in the subsequent statute. Nor has any, or any serious, argument to the contrary effect ever been put forward. It would run counter to a fundamental principle of constitutional law of the United Kingdom.

The conclusion to which the preceding survey leads is that in most municipal systems of law treaties have a much greater force than customary international law. Moreover in a growing number of countries treaties have a greater degree of legal force than subsequent but inconsistent municipal law. It must be hoped that these tendencies will become more pronounced so as eventually to establish and fortify the supremacy of international law. But however fervently international lawyers will be tempted to share this hope, they should be fully aware of the great dangers which legislation by treaty may involve if it is not entrusted to strict and continuous parliamentary control. There are many students of international and constitutional law who regard the substitution of bureaucratic for parliamentary control as one of the principal dangers to which international organizations such as the European Economic Community are exposed. One cannot but hope that a radical reform will be required in order to avoid the risk of national legislatures passing statutes which violate treaty obligations.

#### IV. THE EFFECTS IN THE FORUM STATE OF FOREIGN VIOLATIONS OF INTERNATIONAL LAW (THE GENERAL RELATIONSHIP BETWEEN *ORDRE PUBLIC* AND INTERNATIONAL LAW)

When one comes to consider the effects which the forum State can or should attribute to international wrongs committed by a foreign State, the judge is rid of the fetters his own constitutional law may impose upon him. Both in law and from the point of view of sentiment or psychology he is free to render the requirements of public international law effective. Non-recognition or nullity in relation to a foreign State's international tort presupposes a judicial attitude that must appear to many as attractive or at least as natural. It is not difficult to make this clear by reverting to the case which has already been mentioned<sup>2</sup> and in which English courts believed themselves to be able and compelled to disregard a treaty with the Federal Republic of Germany which had not been incorporated into English law. Suppose in that case the English court, rejecting the defence of the statute of limitations, had given judgment for the plaintiffs whose prior action in Germany had been held to be barred and therefore was dismissed. Suppose the plaintiff had taken the English judgment to

<sup>1</sup> See, among numerous other cases, *Madzimbamuto v. Lardner-Burke*, [1969] 1 A.C. 645, at p. 723 *per* Lord Reid. On the status of E.E.C. law, in particular, see Lawrence Collins, *European Community Law in the United Kingdom* (1975), pp. 17 sqq., who argues convincingly that there is no room for departing in the case of E.E.C. law from the traditional English law. (The opposite view expressed by Winterton, *Law Quarterly Review*, 92 (1976), p. 615 is wholly unconvincing; his suggestion that the subsequent statute 'was not, in fact, an Act of Parliament' can only be described as untenable.) The position in Eire is the same: *Re Lawless*, I.L.R. 24 (1957), p. 420.

<sup>2</sup> Above, p. 21.



Switzerland in order to enforce it there. Would the Swiss court enforce the English judgment, although it was in conflict with the earlier German judgment which, as a result of Britain's breach of international law, had been disregarded there?

The problem in all its sharpness arises only where a foreign country's internal law is applicable in the forum but said to be contrary to public international law. No real difficulty arises in cases in which the foreign State's acts can necessarily be tested only by the tenets of public international law, as occurs in particular in case of external acts. Thus public international law must decide whether the waters in which a collision happened are the territorial waters of a foreign State or whether the jurisdiction purported to be exercised in, say, criminal or taxation matters is legitimate or excessive or whether the denial of personal immunity to a diplomat is lawful. In order not to extend the scope of the discussion too much, this type of case will have to be excluded, however capriciously the line may appear to be drawn.

It is obvious that in cases of the type intended to be explored the national judge has two different legal tools available in order to avoid, if he so wishes, the duty of giving effect to an international delinquency, viz. *ordre public* or public international law *per se*, and *prima facie* it does not matter which of these tools the judge may decide to employ, provided he reaches the correct result. Yet differences are liable to arise in a very limited category of facts. Hence on a previous occasion in 1954 it was attempted to show that for many reasons reliance on the objective and absolute standards of public international law was much to be preferred.<sup>1</sup> *Ordre public* is frequently designed to protect or assert the interests or values of the judge's nation, while public international law provides a more neutral and at the same time a uniform standard which has the additional attraction of assisting in rendering public international law more effective—a significant element in the case of a legal system that all *homines bonae voluntatis* wish to develop and strengthen, but the effectiveness of which is limited yet in need of expansion.<sup>2</sup> To suggest public international law as a directly applicable test implies its obligatory character so as to deprive the judge of any discretion.<sup>3</sup> Yet there is no need to shrink from such a conclusion:<sup>4</sup> it has the advantage

<sup>1</sup> 'International Delinquencies before Municipal Courts', *Law Quarterly Review*, 70 (1954), p. 181 or *Studies in International Law* (1973), p. 366.

<sup>2</sup> This point is made, for instance, in the thoughtful contribution by Professor Jänicke on 'International *Ordre Public*', *Berichte der Deutschen Gesellschaft für Völkerrecht*, 7 (1967), p. 77, particularly p. 84. The learned author is probably to a large extent in agreement with the submissions made in the text, but it is odd that he advocates, not the overriding effect of public international law as such, but only of the 'international *ordre public*' which in his terminology seems to be limited to what is known as the *jus cogens* of public international law. It is difficult to understand the justification or the necessity for such a limitation. In a recent paper of great value ('Le droit international privé face au droit international', *Revue critique de droit international privé*, 1976, p. 261) Professor Rigaux has reminded us (p. 284) that Niboyet in 1928 and since then many others have spoken in favour of giving effect to 'un véritable ordre public international'.

<sup>3</sup> This is really the essential distinction; resort to *ordre public* is in the last resort discretionary, the application of public international law is or ought to be mandatory. For a general discussion of the relationship between public international law and *ordre public* see Lipstein, *Recueil des cours*, 135 (1972-I), pp. 189-92.

<sup>4</sup> Jänicke, loc. cit. (above, n. 2), p. 119, is right in pointing out that it is not at present

of being progressive; of facilitating both the reasoning and the decision of the judge and of protecting him against participating in the consummation of an international wrong.

Both the arguments previously put forward and the results then adumbrated are fully maintained; indeed, hardly any criticism of a fundamental nature has become known. Nor is it intended to repeat anything then said. Rather is it proper to review certain recent developments which are likely to lend emphasis to the suggestion that in appropriate cases the national judge should allow himself to be guided by public international law as opposed to his own public policy and that for him the violation of international law by a foreign State should be sufficient and even compelling to reject the application of its law.

For this purpose two aspects of particular significance will be selected for closer investigation. On the one hand something will have to be said about judicial attitudes which disclose a tendency to apply or to purport to apply public international law, though nominally it is public policy that is being prayed in aid. On the other hand it will be shown that public policy is an unsafe rule of decision in that it may enable the national court to reach and justify decisions which are alien to an enlightened system of law and the demands of justice.

Before turning to these two headings one must make it clear that it is not proposed to allow room to the doctrine of the sacrosanctity of the foreign act of State, a doctrine which, if it existed, would preclude any investigation into a foreign legal system's reconcilability with public international law or, possibly, with public policy. The doctrine with all its implications is peculiar to the law of the United States of America where it is now established to rest on constitutional 'underpinnings',<sup>1</sup> that is to say, it is designed to preserve the sole control of the Executive over foreign affairs. However, not only the legislator,<sup>2</sup> but also the very branch of government in charge of foreign affairs, viz. the Department

possible to prove a rule of customary international law imposing a duty not to recognize foreign law which is internationally illegal. But every author who adds an argument in favour of such a duty contributes to its creation, and Jänicke himself suggests with much persuasiveness that 'where a norm is in issue the observance of which decisively interests not only the injured State, but the international community as a whole and which therefore forms part of the international *ordre public* all States should regard it as their duty to refuse recognition to a foreign State's acts of sovereignty which infringe such a norm'.

<sup>1</sup> *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), at p. 423 per Mr. Justice Harlan. The decision and its numerous implications cannot be discussed here in any detail. See, however, *Virginia Law Review*, 51 (1965), p. 604 or *Studies in International Law* (1973), p. 466.

<sup>2</sup> See the so-called Hickenlooper Amendment of 1964. The text can be found, e.g., in *International Legal Materials*, 11 (1972), pp. 41, 42. See further the Foreign Sovereign Immunities Act 1976 (*International Legal Materials*, 15 (1976), p. 1388) which provides in s. 1605 (a) (3) that a foreign State shall not be immune in any case 'in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign State'. The same applies if the property 'is owned or operated by an agency or instrumentality of the foreign State' which is engaged in a commercial activity in the United States. For a recent review of the Act of State doctrine see Leigh and Sandler, *Virginia Journal of International Law*, 16 (1976), p. 685. Lower courts unfortunately continue to attribute its full strength to the doctrine: see, e.g., *United Bank Ltd. v. Cosmic International Inc.*, 542 F. 2d 868 (1976) or *D'Angelo v. Petroleos Mexicanos*, 422 F.Supp. 1280 (1976).



of State,<sup>1</sup> have to a large extent disowned it, so that even in the United States its disappearance or at least its severe restriction is on the cards. In Europe there exists in a limited type of case some evidence of a kind of immunity *ratione materiae*,<sup>2</sup> but there has never been any trace of a general principle that would undermine the relevance and importance of the questions to be discussed. There is certainly no evidence whatever that in Europe the principle of the separation of powers is so understood or, perhaps one should say, so misunderstood as to compel a court, in deference to the actual or possible views of the Executive, to apply a foreign law which is clearly opposed to public international law—and this is the sole point in issue here.<sup>3</sup>

1. In the first place one cannot help noticing symptoms of *ordre public* acquiring a more international rather than a national or even nationalistic character, so that direct reliance on international law becomes a more familiar and safer guide.

Unfortunately we cannot, it is true, attach too much importance to a dictum by Sir Hersch Lauterpacht according to which *ordre public* 'must be regarded as a general principle of law in the field of private international law', so that 'it may not improperly be considered to be a general principle of law in the sense of Article 38 of the Statute of the Court' and that 'its content must be determined in the same way as that of any other general principle of law in the sense of Article 38 of the Statute, namely by reference to the practice and experience of the municipal law of civilized nations in that field'.<sup>4</sup> If this were true, the distinction between *ordre public* and a rule of international law would not survive for long. Moreover, Professor Lipstein, in a very moderate, but highly persuasive contribution,<sup>5</sup> has shown that the opinions delivered in the case before the

<sup>1</sup> Above, p. 15 n. 2.

<sup>2</sup> It is possible that the idea is inherent in the decision of the Court of Appeal in *Buttes Gas & Oil Co. v. Hammer*, [1975] 1 Q.B. 557, and also in such cases as *M. Isaacs & Sons v. Cook*, [1925] 2 K.B. 391, where it was held that a communication by the High Commissioner of Australia in his official capacity to the Prime Minister of Australia in execution of his duties is absolutely privileged as an act of State. See also *Szalatnay-Stacho v. Fink*, [1947] K.B. 1, where, perhaps surprisingly, the defence of act of State was disclaimed by Counsel (p. 6); on this case as decided at first instance see Mann, *Modern Law Review*, 9 (1946), p. 179. And see the French decision, Cour de Paris, 26 February 1880, D.P. 1886, 1. 393 and the material referred to by Mann, *Studies in International Law*, p. 430, n. 1. The French practice according to which 'les actes se rattachant aux relations internationales de la France ne sont pas de nature à être déferées à la juridiction administrative' (Conseil d'État, 11 July 1975, *Clunet*, 1976, 126) may also be expressive of the same idea.

<sup>3</sup> It is, however, not without interest to remember the practice of the civil divisions of the French Cour de Cassation according to which the interpretation of treaties is a matter for the government in so far as they 'mettent en jeu des questions de droit public international'. On the other hand the criminal division as well as the Conseil d'État take the view that the interpretation of treaties invariably belongs to the Executive. The reason lies in the idea of the separation of power. In this sense the French courts, on whose practice see Batiffol-Lagarde, *op. cit.* (above, p. 22 n. 4), nos. 37 and 40, give to that principle a wider, though different, meaning than the United States of America. All these matters would be worthy of a fresh, broadly based comparative study.

<sup>4</sup> *Case Concerning the Application of the Convention of 1902 Governing the Guardianship of Infants* (Netherlands v. Sweden), *I.C.J. Reports*, 1958, p. 55, at p. 92.

<sup>5</sup> *International and Comparative Law Quarterly*, 8 (1959), p. 506; cf. Batiffol-Lagarde, *op. cit.* (above, p. 22 n. 4), no. 303.

International Court of Justice in which the quoted words occur are open to very considerable doubt. It is, therefore, more prudent to treat them as an interesting thought which is not reflected in actual State practice. Yet it is this practice that has in fact shown a measure of universalism, at any rate outside France where, notwithstanding an earlier lead given by Niboyet,<sup>1</sup> authors of high authority continue to assert that 'en réalité les tribunaux n'apprécient pas la régularité au regard de la loi étrangère, ou même du droit international, de l'acte en cause; ils lui refusent seulement effet en France au nom de conceptions françaises réputées indispensables à sauvegarder'.<sup>2</sup>

One of the strongest cases (in which, however, the foreign law did not constitute an international wrong) comes from Germany, where the Federal Supreme Court held<sup>3</sup> that an insurance policy covering the transport of works of art from Nigeria to Hamburg could not be enforced by the assured, who was exporting the works of art in breach of Nigerian law. The rationale was that as a result of a Convention sponsored by U.N.E.S.C.O., but not then adopted by Germany, the exportation of cultural possessions was considered to be contrary to public order and impeding the understanding between nations. 'Within the community of nations there exist definite and fundamental convictions about every country's right to protect its cultural heritage and about the condemnation of practices which jeopardize it and should be suppressed. Therefore, in the interest of the preservation of decency in international intercourse, the exportation of cultural possessions prohibited by the country of origin is unworthy of legal protection.' This is a significant case, because it clearly shows international law as the standard whereby the legality of a transaction is being measured. It is the more remarkable in that in Germany it is by no means certain that there exists a firm and general principle to the effect that the deliberate violation of a foreign prohibition is necessarily contrary to *ordre public*.<sup>4</sup>

Such a principle does exist in England, where at the same time its dangers have become apparent. In England a contract is illegal 'if its performance will involve the doing of an act in a foreign and friendly State which violates the law of that State'.<sup>5</sup> However strongly one may wish to support the condemnation of a

<sup>1</sup> See above, p. 29 n. 2.

<sup>2</sup> Batiffol-Lagarde, *op. cit.* (above, p. 22 n. 4), no. 357. The approach is similar in Germany.

<sup>3</sup> BGHZ. 59, 82 (22 June 1972). See the detailed analysis of the decision by Bleckmann, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 34 (1974), p. 112. Another case of considerable interest is the decision of the Court of Appeal in Brussels, 20 January 1965, *Pasicrisie belge*, 1966, vol. 2, p. 19 (in Flemish), or in an abbreviated French version, *Revue belge de droit international*, 1967, p. 566: In 1954 the Governor of Goa caused a letter of credit to be opened. The bank paid, but after the annexation of Goa by India in 1960 a Governor in exile in Portugal claimed repayment. The Court of Appeal dismissed his action, but held that he had *locus standi*: Goa 'a été envahi et occupé à main armée par l'État de l'Inde; qu'aucune conséquence juridique ne peut être reconnue à cet acte de violence, en attendant un traité international; . . . que la reconnaissance de cette violence serait complètement contraire à l'engagement qui a été pris par les États membres des Nations Unies (dont l'Inde et le Portugal), lors de la signature de la Charte'.

<sup>4</sup> See the note by Mann, *Neue Juristische Wochenschrift*, 1972, p. 2179, on the case referred to in the preceding note.

<sup>5</sup> *Regazzoni v. Sethia*, [1958] A.C. 301, at p. 317 *per* Viscount Simonds. For the French law on the point see Batiffol-Lagarde, *op. cit.* (above, p. 22 n. 4), no. 598.



contract which by its terms *necessitates the parties or one of them*<sup>1</sup> committing an illegality in a foreign country, so broad, vague and inexact a term as 'involve' creates great dangers,<sup>2</sup> as can be demonstrated by the case in which it occurs and the principle was most authoritatively stated. Under a contract governed by English law the Swiss plaintiff bought from the English defendants a quantity of Indian twills c.i.f. Genoa. Both parties knew that the goods were to be resold to South Africa, that the law of India prohibited the export of goods directly or indirectly destined for South Africa and that the sellers intended to find an Indian supplier who would not ask inconvenient questions about the ultimate destination of the goods. In these circumstances, so the House of Lords held, 'deference to international comity'<sup>3</sup> required the contract to be illegal in English eyes, although no acts actually done or to be done in India were proved. 'Comity' may refer to 'rules of politeness, convenience and goodwill'.<sup>4</sup> In this sense the term is an unsafe guide and should be without legal relevance, for it is capable of justifying whatever result judicial discretion may prefer. Or 'comity' is, or is intended to be, synonymous with international law. This would be a welcome guide and it was in fact adopted by Best C.J. more than 150 years ago, when he held that the raising of a loan to support rebels in their revolutionary activities against a friendly State was contrary to 'the law of nations',<sup>5</sup> and similarly, though perhaps a little surprisingly, by the Court of Appeal in Paris when it held in 1966 that a contract made in Geneva between two Liechtenstein corporations for the purchase and sale of war materials was 'contraire à l'ordre public international'.<sup>6</sup> But in 1958 in *Regazzoni*'s case the House of Lords implied that even if the legislation of India, a member of the British Commonwealth, directed against South Africa, then still a member of the Commonwealth, had constituted a breach of international law, an English court had no alternative but to disallow an attempt to infringe or evade it, for it is just this consequence which is implied in Lord Reid's remarkable, though imprecise and legally dubious, statement according to which<sup>7</sup>

it is impossible for a court in this country to set itself up as a judge of the rights and wrongs of a controversy between two friendly countries, we cannot judge the motives or the justifications of governments of other countries in these matters and, if we tried to do so, the consequences might seriously prejudice international relations. By

<sup>1</sup> This probably was the *ratio decidendi* in *Foster v. Driscoll*, [1929] 1 K.B. 470 which related to smuggling of alcohol into the United States during prohibition.

<sup>2</sup> See Mann, *Modern Law Review*, 21 (1958), p. 130. A fresh view of *Regazzoni*'s case confirms the impression that it was an unfortunate decision, because the facts did not support it. It is perhaps one of those cases which would have decided differently if the argument had been put less high.

<sup>3</sup> *Regazzoni v. Sethia*, [1958] A.C. 301, at p. 319 *per* Viscount Simonds. See also Lord Keith at p. 327.

<sup>4</sup> Oppenheim (ed. Lauterpacht), *International Law*, vol. 1, 8th edn. (1955), p. 34 n. 1.

<sup>5</sup> *De Wütz v. Hendricks* (1824), 2 Bing. 314, 315-16.

<sup>6</sup> 9 February 1966, *Revue critique de droit international privé*, 1966, p. 264 with note by Louis-Lucas.

<sup>7</sup> [1958] A.C. 301, at p. 326. Lord Keith at p. 327 said that the English courts could not 'adjudicate upon political issues between India and South Africa'. This is undoubtedly correct, but not in point.

recognizing this Indian law so that an agreement which involves a breach of that law within Indian territory is unenforceable we express no opinion whatever, either favourable or adverse, as to the policy which caused its enactment.

However strongly one may wish to support the condemnation of a contract which by its terms compels the parties or one of them to commit an illegality in a foreign country, and however warmly one should advocate the existence of a rule of international law to that effect, the far-reaching principle formulated by the House of Lords is in many respects open to considerable doubts. In fact it is peculiarly apt to indicate the wide and disquieting gulf between public policy defined by the idiosyncrasies of the national judge and public international law as a guide. It is not possible within the confines of the present observations to explore in depth the question whether the Indian prohibition of exports to South Africa was contrary to public international law, but there is undeniably material which required consideration of the problem. It is by no means fanciful to suggest that in modern international law economic constraint is illegal; suffice it to recall the United Nations' Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States of 1965,<sup>1</sup> according to which 'no State may use . . . economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights or to secure from it advantages of any kind'. It may be that this Declaration is typical of the United Nations' 'double-talk'.<sup>2</sup> It is even more likely that the Declaration is without legal force. Yet it is indicative of a possible legal principle which may find support elsewhere. A second line of investigation arises from the participation of both India and South Africa in the General Agreement on Tariffs and Trade (G.A.T.T.). According to its Article XIII, 'no prohibition or restriction shall be applied by any Contracting Party . . . on the exportation of any product destined for the territory of any other Contracting Party, unless . . . the exportation of the like product to all third countries is similarly prohibited or restricted'. If for both or either of these reasons the Indian prohibition had been internationally illegal (a hypothesis which, let it be repeated, is for present purposes simply assumed, but in no way accepted), then the House of Lords' somewhat facile reliance on 'comity' or on the irrelevance of 'motives' would have been misplaced. The real question would or ought to have been: does public international law require or even permit the application of national public policy upholding the binding force of Indian legislation or, on the contrary, its condemnation as an international wrong? Is it permissible to treat the violation of a foreign law as contrary to public policy if such law itself is contrary to public international law? The House seemed, perhaps a little faintly, to admit exceptions from the English rule in case of the foreign legislation's being a measure of persecution.<sup>3</sup> Should it not also admit an exception in case of the

<sup>1</sup> General Assembly Resolution 2131 (xx), paragraph 2, in *International Legal Materials*, 5 (1966), p. 374.

<sup>2</sup> The majority surely did not intend it to operate in favour of South Africa.

<sup>3</sup> Lord Reid, [1958] A.C. 301, at p. 325, Lord Somervell at p. 330; see also Viscount Simonds at p. 319.



measure's being discriminatory or for other reasons internationally illegal? It does not matter whether the point is being dealt with by way of rule and exception. What does matter is that a national court should not give assistance to the commission of an international illegality by a foreign State whose laws are applicable. If Indian legislation had constituted an international wrong it should be refused recognition and its violation ought not to be condemned by national judges. There is no reason to regret some lines written in the summer of 1956:<sup>1</sup>

anyone who thinks of Nazi or Communist laws, of their far-reaching international repercussions and their claims to international enforcement will be bound to read *Regazzoni's* case with a feeling of bewilderment. One also wonders how the decision will work out in the following, not wholly imaginary case: X, a Jewish merchant in Manchester, needs Egyptian cotton. By Egyptian law the direct or indirect supply of Egyptian goods to Jews is prohibited. Y, a merchant in London whom Egyptian law defines as 'Aryan' can obtain Egyptian cotton. He agrees to do so and sell it to X. Will X's action be dismissed on the ground that . . . the courts of one country should not help to break the laws of another?

2. If one turns, secondly, to consider whether, apart from international law, *ordre public* is sufficient to achieve results which meet the crucial cases of international wrongs committed by the State of the *lex causae* a negative answer is entirely within the realm of possibility. The main reason is that, as a matter of principle, many countries understand *ordre public*, not as the 'essential principle of justice and morality',<sup>2</sup> that is to say, as a rule of a fundamental and general character, but as the specific legal and moral order of the forum; to put it differently, a violation of *ordre public* is liable to be found, not in 'something contrary to the morality of civilized nations as we understand it',<sup>3</sup> but in something contrary to the laws, institutions and conceptions peculiar to the forum. This is known as the relativity of *ordre public* and means that in order to justify resort to it the forum must be affected, there must be a *Binnenbeziehung*, an appropriate relationship or link with a domestic situation. *Ordre public* conceived in so limited and so national, perhaps even chauvinistic, a sense will clearly be determined by standards other than those of public international law and may, therefore, recognize and enforce foreign laws or transactions which international law would condemn—not necessarily because such laws and transactions meet with approval, but because they are not of a sufficiently close concern. The point is made very clear in a recent decision of the German Federal Supreme Court.<sup>4</sup> The question was whether the property of the infant son of an Iranian father and a mother of both German and Iranian nationality whose marriage had been dissolved and who were both resident in West Berlin was, in accordance with Iranian law, subject to his father's control to the

<sup>1</sup> Mann, *Modern Law Review*, 19 (1956), p. 524.

<sup>2</sup> The phrase is used by Buckley L.J. (as he then was) in *Saxby v. Fulton*, [1909] 2 K.B. 208, 228.

<sup>3</sup> *Ibid.*, per Kennedy L.J. at p. 232.

<sup>4</sup> 20 December 1972, BGHZ. 60, 68, at p. 79; cf. Kegel, *Internationales Privatrecht*, 4th edn. (1977), p. 239, among many other writers.



exclusion of the mother. The lower court had invoked *ordre public* to give effect to the German doctrine of equal parental rights. The Federal Supreme Court defined the requirements by stating that what mattered was 'the relationship with domestic law in the individual case. If all interested parties are aliens of the same nationality German *ordre public* does not as a rule demand the non-application of parental rights granted by the *lex patriae*. The opposite would lead to the unnecessary imposition of foreign law. If only certain parties are aliens, the particular circumstances of the given legal situation must be examined . . . If only one spouse is a German national the ordinary residence of the family on German territory does not necessarily involve the right to the recognition of equality between husband and wife. In such a case adaptation is required. . .'

It must, however, be emphasized that this requirement of an intensive link with domestic law which is characteristic mainly of Swiss<sup>1</sup> and German law but is also known in England<sup>2</sup> and France<sup>3</sup> is in practice frequently less formidable than at first sight appears and the textbooks suggest. In a large number of cases it is in fact fulfilled, though this is not always appreciated. The starting-point lies in the indubitable fact that if one of the parties is a national of the forum State the necessary link with its law exists. In a case of great significance (which, however, is hardly ever referred to by commentators) the German Federal Supreme Court held<sup>4</sup> that if a treaty between the forum State and one of the parties' national State confers upon the nationals of one country the right to national treatment in the other country, viz. the right to be treated upon terms no less favourable than the terms accorded in like situations to nationals, then the alien may rightfully and necessarily invoke *ordre public* as if he were a national. Such treaty rights exist in innumerable cases, for they are not only expressly conferred upon nationals of the Contracting State, but also originate from a far-flung net of most-favoured-nation clauses. If it is remembered that between the end of the Second World War and 1971 the United States of America alone entered into twenty-one Treaties of Friendship, Commerce and Navigation with, *inter alia*, Belgium, Denmark, France, Germany, Greece, Eire, Italy, Luxembourg, Netherlands (to mention only European countries)<sup>5</sup> and that these treaties, as most of their kind, include both the national treatment and the most-favoured-nation clauses, it is easy to imagine the great reduction which the scope of the 'link theory' would suffer if practitioners were aware of these treaties and undertook the often heavy burden of tracing them. Moreover, in so far as the Parties to the European Convention on Human Rights are concerned,

<sup>1</sup> See, e.g., Vischer, *Internationales Privatrecht*, p. 535.

<sup>2</sup> Lloyd, *Public Policy*, p. 84; Cheshire and North, *Private International Law*, 9th edn. (1974), p. 150; Kahn-Freund, *Transactions of the Grotius Society*, 39 (1954), pp. 39 sqq. and *Recueil des cours*, 143 (1974-III), pp. 428, 429 and probably many other writers.

<sup>3</sup> This is not very clear, but can possibly be inferred from Batiffol-Lagarde, *op. cit.* (above, p. 22 n. 4), no. 367, who discuss what they describe as the 'effet atténué' of *ordre public*.

<sup>4</sup> 8 March 1963, BGHZ. 39, 220, at p. 232 with reference to Art. 2 of the Paris Union relating to Industrial Property of 1883, as amended.

<sup>5</sup> For a list see Mann, *The Legal Aspect of Money*, 3rd edn. (1971), p. 547 n. 2. It is odd that even the United States does not render it easy to ascertain a complete list as it exists from time to time. Whiteman's *Digest* does not seem to contain any list.

it may well be that the denial of a legal right to the national of a member State on the ground of his foreign nationality would be contrary to Article 6 in conjunction with Article 14 which in the view of the majority of the European Court of Human Rights 'is complementary to the other normative provisions of the Convention and Protocols: it safeguards individuals, or groups of individuals, placed in comparable situations, from all discrimination in the enjoyment of the rights and freedoms set forth in those provisions'.<sup>1</sup> And in so far as the Parties to the International Covenant on Civil and Political Rights are concerned (which was adopted by the General Assembly of the United Nations on 16 December 1966 and came into force for the United Kingdom on 20 August 1976<sup>2</sup>) it would seem that the equal protection of the law guaranteed by Articles 2, 14 and 26 prohibits any discrimination on the ground of nationality. It is submitted that even where such treaties are not incorporated into the national law (as is frequently the case in Britain), they can and must be taken into account by the court when assessing the scope or intensity of *ordre public*.

Yet, however wholesome the influence of the 'link theory' undoubtedly is in many contexts, within the limited field of the subject-matter of the present discussion it may impede decisions which public international law requires. How do we judge the validity of a marriage between a man and a woman of different race or religion who by the law of their home country are incapable to intermarry? There can be no doubt that public international law condemns such legislation and renders it illegal and void.<sup>3</sup> If the municipal judge were to have resort to public international law he would not in any circumstances recognize or give effect to such incapacities, and it is submitted that this is how it should be. But if he proceeds by way of *ordre public* no such absolute and general conclusion will be reached. As regards incapacity based on differences in race, it appears that, while it is almost invariably condemned, there are hardly any decisions and some writers make its rejection dependent upon the parties' residence within the forum.<sup>4</sup> There is in fact strong support for such a distinction where the incapacity is derived from differences in religion. The material on this question is enormous.<sup>5</sup> It must suffice to exemplify it by referring to

<sup>1</sup> *Belgian Linguistics* case, 23 July 1968, paragraph 9 (I.L.R. 45 (1972), p. 114 at p. 164); *National Union of Belgian Police* case, 27 October 1975, paragraph 44, with a strong and logically unassailable Dissent by Judge Sir Gerald Fitzmaurice.

<sup>2</sup> *United Kingdom Treaty Series*, No. 6 (1977) (Cmd. 6702).

<sup>3</sup> See Art. 16 of the Universal Declaration of Human Rights; Articles 12 and 14 of the European Convention on Human Rights. See also Articles 2 and 23 of the International Covenant on Civil and Political Rights of 16 December 1966 (previous note). When in the *Case Concerning the Barcelona Traction Light and Power Co.* (Belgium v. Spain) the International Court of Justice spoke of those obligations which exist *erga omnes* and include 'the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination' (I.C.J. Reports, 1970, p. 32), it certainly did not wish to have the rights discussed in the text eliminated. See, generally, Brownlie, *Principles of Public International Law*, 2nd edn. (1973), p. 578 with many references, or any other textbook on public international law.

<sup>4</sup> For a summary of the present state of the law see Staudinger-Gamillscheg, Art. 13 n. 452.

<sup>5</sup> For an excellent survey see Staudinger-Gamillscheg, Art. 13 nn. 436 to 451 with a massive collection of material. In England there has never been any doubt about either of the cases mentioned in the text: see, e.g., Dicey and Morris, *Conflict of Laws*, 9th edn. (1973), pp. 73, 231, though there is no decision directly in point. Mann, *Transactions of the Grotius Society*, 44



Germany where the point has arisen in an almost dramatic form. In 1931 the German Supreme Court recognized an Austrian provision prohibiting a marriage between a Christian and a non-Christian as compatible with German public policy;<sup>1</sup> the actual case involved a Protestant husband of Austrian nationality and a Jewish wife of Russian nationality. The Austrian law was changed and the German decision of 1931 is today without any or any substantial support.<sup>2</sup> It is ironical and at the same time very sad that at present particular international importance and interest attaches to the law of Israel which prohibits and invalidates the marriage between Jews and non-Jews.<sup>3</sup> Forty years later, in 1971, the German Federal Supreme Court held that, notwithstanding this state of affairs, a German Registrar of Marriages was permitted to perform a ceremony of marriage between an Israeli national of Jewish faith resident in Israel and a Christian woman of German nationality and residence.<sup>4</sup> One would not wish to quarrel with the decision or anything said in it. But it is in terms confined by its rationale, viz. the statement that it would be 'intolerable if a *German national* were prevented from marrying in the Federal Republic of Germany merely because the parties have different religions'.<sup>5</sup> It is submitted that there ought to be no room for a qualification of this kind and that a judge who applies public international law (as a German judge should do more readily than any other)<sup>6</sup> will treat such legislation as an absolute wrong, as a plain violation of human rights and fundamental freedoms, as discriminatory, however tenuous the factual connection with his own law or country may be. Perhaps the German court would have done so if it had paid attention to the teachings and requirements of public international law.<sup>7</sup>

The conclusions to which these observations lead may be summarized as follows:

1. If in principle a violation of international law should not be sanctioned by the courts of the forum, public policy does not require and perhaps should not (1958-9), p. 29 or *Studies in International Law* (1973), pp. 346, 347, expressly relied on the European Convention.

<sup>1</sup> 16 May 1931, *RGZ*. 132, 416.

<sup>2</sup> See, however, District Court of Bremen, 12 July 1966, *IPRspr.* 1966/7 No. 60: the petition for nullity by a Jewish husband against his Greek-Orthodox wife succeeds on the ground of the Greek law against marriages between a Christian and a non-Christian (Art. 1353 of the Greek Civil Code).

<sup>3</sup> See in particular Gamillscheg (above, p. 37 n. 4), Art. 13 n. 437. Whether the law of Israel has been correctly interpreted by the German courts is a question which cannot be pursued in the present context.

<sup>4</sup> 12 May 1971, *BGHZ*. 56, 180.

<sup>5</sup> *Ibid.*, p. 192.

<sup>6</sup> Above, p. 18.

<sup>7</sup> The Federal Supreme Court referred to Art. 16 of the Universal Declaration (p. 190), but failed to discuss or even to mention any other international source. It is particularly remarkable that the European Convention on Human Rights was ignored, although it is formally incorporated into and forms part of German law and although so distinguished an author as Professor K. J. Partsch, *Die Rechte und Freiheiten der europäischen Menschenrechtskonvention* (1966), p. 214, expressly mentions the inadmissibility of prohibitions based on race or religion. This is not the first time that the Federal Supreme Court has examined the applicability of *ordre public* without considering relevant rules of international law: see 25 March 1970, *BGHZ*. 53, 357 where the court failed to have regard to Art. 6 of European Convention on Human Rights.



allow a court to treat as illegal the violation of a foreign law which constitutes an international wrong.

2. The effect in the forum State of a foreign law which constitutes an international wrong should be assessed by public international law rather than public policy.

## V. THE IMPOSITION AND DEPRIVATION OF NATIONALITY

At this point it becomes possible to look a little more closely at some of the groups of cases which are apt to illustrate the largely general propositions developed in the preceding sections and for this purpose to turn in the first place to the law of nationality. It has for long been a rich source of cases in which municipal courts have applied (and often misapplied) public international law and, more particularly, refused to recognize the effects of international illegalities. Although many other examples could be adduced and although a vast amount of material, both judicial and academic, is available in England as well as abroad,<sup>1</sup> it is proposed to limit the review to certain aspects of the law of nationality resulting from the delinquencies of Nazi Germany before and during the Second World War. They confronted the world with problems which are highly instructive to the student of law and which may, therefore, be conveniently scrutinized within the context of the present contribution. They will be discussed in the light of the leading decisions only, so that intermediate decisions of lower courts will be no less ignored than certain German statutes which at a relatively late date<sup>2</sup> created a firmer and also more specific basis.

1. Beginning with the occupation of Austria in March 1938, Nazi Germany decided upon the *imposition* of her nationality in the territories she purported to annex. The first case which after the war reached the Federal Constitutional Court of Germany<sup>3</sup> arose from the occupation of Czechoslovakia in March 1939. German nationality was immediately imposed upon all Czechs (other than Jews<sup>4</sup>). The restored Republic of Czechoslovakia, on 2 August 1945, enacted a decree whereby persons of Czechoslovakian nationality but German race 'who according to the laws of a foreign occupation authority' had become Germans were

<sup>1</sup> See Brownlie, this *Year Book*, 39 (1963), p. 284 and *Principles of Public International Law*, 2nd edn. (1973), pp. 367, 638, who lists most of the earlier material. As to State succession and nationality generally see Brownlie's article, pp. 319 sqq.; Whiteman's *Digest*, vol. 2, p. 923 and vol. 8, p. 104; O'Connell, op. cit. (above, p. 3 n. 6), p. 391; Batiffol-Lagarde, op. cit. (above, p. 22 n. 4), no. 74; Mann, *Modern Law Review*, 5 (1942), p. 218 or *Studies in International Law*, p. 515; Gräupner, *Transactions of the Grotius Society*, 32 (1946), p. 87. On the much-discussed question whether in the event of State succession nationality is determined by international or municipal law see Federal Supreme Court, 23 October 1963, *RzW.* 1964, 130 or *IPRspr.* 1962/3 No. 243 on the position in Israel between 1948 and 1952. Some of the German problems and cases referred to in the following pages were discussed by Mann, 'Zwangseinbürgerungen und das Völkerrecht', *Friedenswarte*, 53 (1956), p. 101 and *Beiträge zum internationalen Privatrecht* (1976), p. 39.

<sup>2</sup> Statutes of 22 February 1955 and 17 May 1956.

<sup>3</sup> 28 February 1952, *BVerfGE.* 1, 322 or *IPRspr.* 1952/3 No. 316a.

<sup>4</sup> This exception was recognized by the Court of Appeal in Munich, 10 October 1969, *RzW.* 1970, 172 or *IPRspr.* 1968/9 No. 288—perhaps for benevolent reasons.

deemed on the date of such acquisition to have lost Czechoslovakian nationality.<sup>1</sup> Was a Czech who lived in Czechoslovakia in 1939 a German or a Czech national or stateless? The Federal Constitutional Court accepted that the annexation of Czechoslovakia was contrary to international law, but held that neither Article 4 of the Weimar Constitution nor Article 25 of the Constitution of 1949<sup>2</sup> nor the general principles of international law required the acquisition of German nationality in 1939 to be held null and void, for a State's nationality was a matter exclusively for its municipal law and its invalidity in international law could be ignored. The decision was, it is submitted, wholly unsatisfactory. Germany had no semblance of right to impose her nationality upon the inhabitants of a foreign country unlawfully invaded. Even if the occupation of the territory had not been illegal, there was much to be said for the conclusion that the compulsory imposition of nationality without the grant of any option would have been an illegal excess of jurisdiction.<sup>3</sup> In any event the decision was self-contradictory: it stated that, on the one hand, the admitted invalidity of the annexations after 1 January 1938 did not support the view 'that all compulsory impositions of German nationality resulting from the annexations are to be considered as null and void'; on the other hand one reads that 'all compulsory naturalizations connected with annexations (after 31 December 1937) are in so far invalid as the persons in question are being claimed as their nationals by the States whose territory was annexed'. Since *ex hypothesi* Czechoslovakia never ceased to exist in law and undoubtedly 'claimed' its nationals at all times up to August 1945, it is difficult to see how in the face of such 'claim' they could ever become German. From a human point of view the decision will be readily understood: there was no point in treating persons as Czechoslovakians (or as stateless) whom Czechoslovakia had in August 1945 deprived of its nationality. Such opportunism, even if it takes the form of humane kindness, may sway the legislator, but should not allow a judge to legalize the effects of an admitted wrong.<sup>4</sup>

The principle so established by the Federal Constitutional Court was followed in regard to Austria: Austrians were held to have become Germans in 1938, and the same applied to the inhabitants of the Sudeten territory.<sup>5</sup>

<sup>1</sup> This was changed in 1953 in regard to persons who had continued to live in Czechoslovakia, but this very change was held to be contrary to Art. 25 of the German Constitution, because it was held to be a generally recognized principle of law that nationality could not be compulsorily imposed: Court of Appeal in Cologne, 18 May 1960, *IPRspr.* 1960/1 No. 239, partly in I.L.R. 32, p. 166—again perhaps for benevolent reasons.

<sup>2</sup> On these provisions see above, p. 18.

<sup>3</sup> There is much evidence of the existence in customary international law of an option or a 'right to elect'. See, e.g., *Murray v. Parkes*, [1942] 2 K.B. 123, at p. 136 *per* Singleton J. and the United States cases mentioned below, p. 42 n. 2, which require 'their own consent and election'; J. Mervyn Jones, *British Nationality Law and Practice* (1947), p. 40; Brownlie, *Principles of Public International Law*, 2nd edn. (1973), p. 540; Sir Gerald Fitzmaurice, *Recueil des cours*, 73 (1948-II), p. 255, at p. 284; Batiffol-Lagarde, *op. cit.* (above, p. 22 n. 4), no. 74. Against an option: Oda in Sorensen's *Manual of Public International Law*, p. 479; O'Connell, *op. cit.* (above, p. 3 n. 6), p. 393; Dahm, *op. cit.* (above, p. 3 n. 6), vol. 1, pp. 478, 479; Verdross, *op. cit.* (above, p. 3 n. 6), p. 290.

<sup>4</sup> See on this point, generally, below, p. 45.

<sup>5</sup> As to Austrians: Federal Constitutional Court, 12 December 1952, *BVerfGE.* 1, 322 or *IPRspr.* 1952/3 No. 316b; 9 November 1955, *BVerfGE.* 4, 322 or *IPRspr.* 1954/5 No. 230. As



In view of the admitted international illegalities committed by Germany one would have expected the post-war courts to disregard all annexations, to treat annexed States as continuing to exist and to have been merely occupied, with the result that none of the nationals ever lost his original nationality. In other words the courts should have adopted what in Austria was described as the 'occupation theory'. In so far as the courts relied upon the *de facto* recognition which, allegedly, certain Western powers had granted to the territorial changes of 1938 this was in law equally doubtful. The acts of recognition, even if they were initially lawful, were revoked with retrospective effect. Moreover, recognition is of a relative character and therefore has effect only between the recognizing and the recognized States. What the United Kingdom and others did by way of recognition could not bind the States of Austria and Czechoslovakia<sup>1</sup> which *ex hypothesi* continued to exist.

The correct attitude required by international law led to the result that the acquisition of German nationality was properly denied in the case of Poles,<sup>2</sup> just as non-German courts denied it in all relevant cases. That after the war the Belgian Cour de Cassation held the imposition of German nationality upon the inhabitants of Eupen and Malmedy to be invalid<sup>3</sup> or the Netherlands courts disregarded the imposition of German nationality upon the people of Danzig<sup>4</sup>

to Sudeten: Bavarian Supreme Court, 21 March 1969, *NfW*. 1960, p. 997 or *IPRspr.* 1968/9 No. 286. The nationality of the 'Sudeten Germans' depended or ought to have depended on the question whether the Munich Agreement of 29 September 1938 was null and void *ab initio* (as Czechoslovakia always maintained) or subsequently became inexistent (as the Federal Republic of Germany believes). The point was pragmatically and elegantly settled by the Treaty of Prague of 11 December 1973. For an illuminating review of the problem see Kimminich, *Jahrbuch für internationale Recht*, 18 (1975), pp. 62, 77 sqq. with references to the very extensive earlier literature which includes Akehurst, *International Relations* (1974), p. 472.

<sup>1</sup> As to the continuity of Austria, in particular, see Verdross, *Völkerrecht*, 5th edn., p. 251, the fundamental work by Verosta there referred to and the illuminating and richly documented discussion by Krystyna Marek, *Identity and Continuity of States in Public International Law* (1968), pp. 338 sqq., who convincingly proves that as a matter of international law Austria never ceased to exist. In the same sense Reut-Nicolussi, *Transactions of the Grotius Society*, 39 (1954), p. 119, at pp. 125 sqq. with references. (The article by Brandweiner in the opposite sense, which is there cited, appeared in English in *Law and Politics in the World Community* (ed. by G. A. Lipsky, 1953), pp. 221, 230 sqq.) The 'occupation theory' which is the official Austrian version and was on innumerable occasions affirmed by Austrian courts (Seidl-Hohenveldern, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 14 (1951-2), pp. 219 sqq. and also Supreme Court, 15 October 1947, *Annual Digest*, 14 (1947), No. 15) was generally accepted, particularly by the Nürnberg International Military Tribunal and by the Swiss Federal Tribunal, 23 September 1949, *BGE*. 75 I 289 or *Annual Digest*, 16 (1949), p. 184. As to the continuity of Czechoslovakia see the material referred to by Seidl-Hohenveldern, 'Das Münchener Abkommen im Lichte des Prager Vertrages von 1973' in *Recht im Dienst des Friedens* (Festschrift für Eberhard Menzel, 1975), p. 451, and the Dutch decisions referred to at p. 42 n. 1 below. The treaty which the Federal Republic concluded with Czechoslovakia in December 1973 leaves the general question open (see Frowein, *International and Comparative Law Quarterly*, 23 (1974), pp. 113, 114), though it settles the problem of nationality.

<sup>2</sup> Federal Supreme Court, 18 March 1959, *RzW*. 1959, 254 or *IPRspr.* 1958/9 No. 228; 12 July 1963, *RzW*. 1964, 76 or *IPRspr.* 1962/3 No. 241.

<sup>3</sup> 19 July 1957, I.L.R. 24 (1957), p. 439. See, generally, Rigaux, *Droit public et droit privé dans les relations internationales* (Paris, 1977), p. 72.

<sup>4</sup> Judicial Division of the Council for the Restoration of Legal Rights, 19 July 1956, I.L.R. 24 (1957), p. 434.



and Czechoslovakia<sup>1</sup> is perhaps less remarkable than the practice of courts of the United States of America during the war, when they were called upon to consider the question whether an Austrian who since October 1936 had been living in the United States had in March 1938 become German. This they refused to accept.<sup>2</sup> They started from the principle that they 'must consider not only the municipal law of the foreign nation, but also the accepted rules and practices under international law'. And by these very principles 'Germany could impose citizenship by annexation (collective naturalization) only on those who were inhabitants of Austria in 1938'. While the positive aspect of this conclusion was based on the assumption (as opposed to a finding) that the annexation of Austria had been *de facto* recognized by the United States, in regard to the negative aspect the Court of Appeals, Second Circuit, could rely on much earlier and highly impressive material.

2. When Austria was restored in April 1945 and an Austrian law of 10 July 1945 proceeded on the footing of all those who were Austrians in 1938 being restored to Austrian nationality,<sup>3</sup> the question arose of what effect should be given to such *re-imposition upon those living outside Austria*. The German courts did not doubt that those living in Germany (in addition, of course, to those living in Austria) had also ceased to be Germans.<sup>4</sup> This, so it was said, was necessarily involved in the intention to undo the *Anschluß*. Restoration meant that 'the State of Austria, re-created within its former frontiers, may not be deprived of its former population'. This argument one can well understand. It is concerned with the loss of German nationality assumed to have been acquired in 1938 and does not therefore touch upon international law.

It was, however, an entirely different matter whether former Austrians who in 1945 were living outside Austria and had perhaps acquired a nationality other than German had Austrian nationality re-imposed upon them. The United States decision to which reference has just been made<sup>5</sup> ought to have shown the way to the right principle and the correct result. However, the German Federal Supreme Court decided in favour of such re-imposition even in cases in which

<sup>1</sup> Judicial Division of the Council for the Restoration of Legal Rights, 4 July 1955, I.L.R. 24 (1957), p. 432 (where it is also said that the failure to grant an option was contrary to Dutch public policy); 29 June 1956, I.L.R. 24 (1957), p. 536; District Court of The Hague, 11 December 1956, I.L.R. 24 (1957), p. 435; in the same sense the Court of Appeal in Brussels, 17 March 1959, I.L.R. 47, p. 31, at p. 33.

<sup>2</sup> *United States ex rel. Schwarzkopf v. Uhl*, 137 F. 2d 998 (1943) or *Annual Digest*, 12 (1943-5), p. 188. In the same sense *United States ex rel. D'Esquivá v. Uhl*, 137 F. 2d 903 or *Annual Digest*, 12 (1943-5), p. 23; *United States ex rel. Zeller v. Watkins*, 167 F. 2d 279 (1948) or *Annual Digest*, 15 (1948), p. 206. On the English cases of *Matter of Application for Patents by A.B.*, (1944) 61 R.P.C. 89 and *Matter of Mangold's Patent*, (1951) 68 R.P.C. 1, see Abel, *International Law Quarterly*, 4 (1951), p. 373 and Mann, *Modern Law Review*, 15 (1952), p. 100.

<sup>3</sup> This followed from the 'occupation theory': above, p. 41.

<sup>4</sup> Federal Constitutional Court, 9 November 1955, *BVerfGE*. 4, 322 or *IPRspr.* 1954/5 No. 230 or I.L.R. 22 (1955), p. 430. In so far as the inhabitants of Austria were concerned this was never in doubt: Federal Supreme Court, 18 January 1956, *BGHStr.* 9, 53, 175 or *IPRspr.* 1956/7 No. 221a and 221b or I.L.R. 23 (1956), pp. 364 and 367; Federal Administrative Court, 28 September 1965, or *IPRspr.* 1964/5 No. 306; 30 October 1954, *IPRspr.* 1954/5 No. 228 or I.L.R. 21 (1954), p. 175.

<sup>5</sup> Above, n. 2.

the persons concerned were living in and had become subjects of the United Kingdom, the United States of America or Israel.<sup>1</sup> It was said that Austrian law applied, because allegedly there were no general principles of public international law relating to nationality in the event of State succession or the restoration of a State. Or it was said that 'as a matter of constitutional and international law the *Anschluss* had been a wrong', but its legality or illegality was irrelevant, for the 'factual change of sovereignty' was alone decisive both as regards the acquisition in 1938 of German nationality and the re-imposition of Austrian nationality in 1945. It is submitted that, on the footing of the German view that such persons had ceased to be Austrians in 1938,<sup>2</sup> these conclusions do not merit approval, and it is satisfactory to observe that they were in fact rejected by the Court of Appeal of West Berlin.<sup>3</sup> The jurisdiction of a State is confined to its nationals and its territory. It has no jurisdiction over persons of foreign or no nationality resident outside its territory. The fact that such persons were at one time its nationals does not provide it with jurisdiction over them, for there exists no continuing or no sufficient effective link. One is tempted to describe these arguments as elementary,<sup>4</sup> but the regrettable fact remains that in giving effect to part only of Austrian law, viz. the legislation of 1945, but rejecting the full implications of the 'occupation theory', the Federal Supreme Court on its part misapplied the law and exceeded Germany's international jurisdiction.

3. There remains the question whether, if the *compulsory expatriation* of foreign nationals by their national State constitutes an international wrong, other States are entitled and in law bound to refuse recognition to the loss of nationality and to treat the foreigners concerned as having retained their nationality rather than as stateless.

An affirmative answer is inherent in the trail-blazing decision of Germany's Federal Constitutional Court holding that the notorious Nazi decree of 23 November 1941, which deprived all Jews of German nationality who were outside Germany of their nationality and confiscated their property, 'violated fundamental principles. It is to so intolerable a degree irreconcilable with justice that it must be considered to have been null and void *ab initio*', to have been

<sup>1</sup> Federal Supreme Court, 21 October 1959, *RzW.* 1960, 35 or *IPRspr.* 1958/9 No. 230; 27 September 1961, *RzW.* 1962, 37 or *IPRspr.* 1960/1 No. 238; 3 July 1963, *RzW.* 1963, 560 or *IPRspr.* 1962/3 No. 238. Against these decisions notes by Mann, *RzW.* 1960, 182; 1964, 129. In a decision of the Federal Supreme Court, 29 December 1953, *NJW.* 1954, 510 at p. 512 one finds the *dictum*: 'As a matter of public international law an imposed nationality will not as a rule be recognized, because in the absence of a lawful connection with its own legal system the granting State interferes with the sovereignty of another State'.

<sup>2</sup> The point would be entirely different if the German courts had followed the Austrian 'occupation theory' and held that no Austrian ever ceased to be Austrian.

<sup>3</sup> 21 December 1965, *RzW.* 1966, 167 or *IPRspr.* 1964/5 No. 310 or I.L.R. 43, p. 191.

<sup>4</sup> In the same sense Oppenheim (ed. Lauterpacht), *International Law*, vol. 1, 8th edn. (1955), section 219 (p. 553 n. 2), section 240; Lauterpacht at p. 171 of the paper referred to below, p. 45 n. 4; Brownlie, *Principles of Public International Law*, 2nd edn. (1973), p. 392; Dahm, *op. cit.* (above, p. 3 n. 6), vol. 1, p. 470; Verdross, *op. cit.* (above, p. 3 n. 6), p. 309; German-Yugoslav Mixed Arbitral Tribunal in *Peinitsch v. Germany*, *Annual Digest*, 2 (1923/4), No. 121 and almost all the material referred to above, p. 39 n. 1. See Briggs, *The Law of Nations*, 2nd edn. (1952), pp. 503, 504.



'*Unrecht*', non-law, an act of arbitrary power, with the result that in principle all persons affected by the decree had at all times been and remained Germans.<sup>1</sup> A grave infringement of human rights thus having been established by the highest German tribunal itself, one might have expected every English and, indeed, every court to treat the decree as null and void. The curious fact is that, while expressing their strong condemnation of the decree, the supreme tribunals of Switzerland,<sup>2</sup> France,<sup>3</sup> and Israel<sup>4</sup> as well as the Court of Appeals, Second Circuit, in the United States,<sup>5</sup> admittedly before the great German decision of 1968, and the Court of Appeal in England after 1968,<sup>6</sup> gave effect to the decree and held its victims to be stateless. It was the majority of the House of Lords in 1975<sup>7</sup> which took a different and consistent line by deciding in conformity with the German decision that an English resident had not in 1941 become stateless. According to Lord Hodson, to give effect to the German decree would have been contrary to 'the relevant international law'.<sup>8</sup> In the words of Lord Cross of Chelsea, 'it is part of the public policy of this country that our courts should give effect to clearly established rules of international law', and the decree of 1941 'constitutes so grave an infringement of human rights that the courts of this country ought to refuse to recognize it as a law at all'.<sup>9</sup> Lord Salmon, similarly, had 'no doubt that on the grounds of public policy' English courts should refuse to apply the decree,<sup>10</sup> but later he, too, stated that it 'was so great an offence against human rights that they would have nothing to do with it'.<sup>11</sup>

<sup>1</sup> 14 February 1968, *BVerfGE*. 23, 98 or *IPRspr.* 1968/9 No. 281. On this case and the decision of the Court of Appeal presently to be mentioned in the text see Mann, 'The present validity of Nazi Nationality Laws', *Law Quarterly Review*, 89 (1973), p. 194.

<sup>2</sup> 3 October 1948, *BGE*. 74 I 346 or *Annual Digest*, 15 (1948), No. 73, overruling *BGE*. 72 I 407 or *Annual Digest*, 13 (1946), No. 58.

<sup>3</sup> Cass. Civ. (Assemblée plénière), 20 December 1950, *Clunet*, 1951, 176 or *Annual Digest*, 16 (1949), No. 176.

<sup>4</sup> 28 October 1954, *I.L.R.* 21 (1954), p. 197.

<sup>5</sup> Above, p. 42 n. 2.

<sup>6</sup> *Oppenheimer v. Cattermole*, [1973] Ch. 264, reversing *Goulding J.*, [1972] Ch. 585.

<sup>7</sup> [1976] A.C. 249. Lord Pearson at p. 265 differed from the reasoning of the majority in that he agreed with the positivist approach by Buckley and Orr L.JJ. in the Court of Appeal, according to which, if a legislative or executive act of a recognized foreign government, 'however unjust or discriminatory and unfair, has changed the status of an individual by depriving him of his nationality of that country, he does in my opinion effectively cease to be a national of that country'.

<sup>8</sup> *Ibid.*, p. 265.

<sup>9</sup> *Ibid.*, p. 278.

<sup>10</sup> *Ibid.*, p. 282.

<sup>11</sup> *Ibid.*, p. 283. It remains, however, a matter for regret that both Lord Cross of Chelsea and Lord Salmon seemed to accept Scrutton L.J.'s notorious *dictum* in *Luther v. Sagor & Co.*, [1921] 3 K.B. 532, 558, 559, about the alleged limits and risks of applying public policy: pp. 277, 282, 283. In particular Lord Cross of Chelsea went out of his way to stress that refusal to recognize a foreign law 'may be embarrassing to the branch of the executive which is concerned to maintain friendly relations between this country and the foreign country in question': pp. 277, 278. And see Lord Salmon at p. 282 E to F. Such a *dictum* which, fortunately, was immediately followed by the unqualified statement 'that our courts should give effect to clearly established rules of international law', smacks of the American version of the Act of State doctrine (above p. 30). It is opposed to another strand of the British tradition which does not find 'the fear of the embarrassment of the executive a very attractive basis upon which to build a rule of English law': *Kawasaki Kisen Kaishiki Kaisha of Kobe v. Bantham Steamship Co. Ltd.*, [1939] 2 K.B. 544, 552 *per* Sir Wilfred Greene M.R.; *Bank voor Handel en Scheepvaart v. Slatford*, [1953] 1 Q.B. 248, 266 *per* Devlin J. (as he then was); and see *Studies in International Law*, pp. 408-12.



Here, then, the highest tribunal in Britain has given us an exemplary lead in two respects of vital and general importance. Foreign legislation which constitutes an international illegality will in the eyes of an English court be null and void—and it matters not whether the result is reached by the direct application of international law or by way of public policy. It will certainly be necessary to examine each individual case to ascertain whether it does amount to an international wrong in the true sense, but this is a different question and does not affect the principle so clearly enunciated by the House of Lords. Moreover, that principle applies irrespective of whether the result is advantageous or prejudicial to the victim.<sup>1</sup> It is the character of the legislation that precludes the truly judicial mind from having anything to do with it: a judge cannot and ought not to implement a wrong even if it is for the purpose of doing good or of reaching a result that appears to him meritorious. This jurisprudential lesson merits strong emphasis. It has often been ignored. It was ignored by many German courts which, in the words of Lord Hailsham of St. Marylebone,<sup>2</sup> saw 'small value in adding hardship to injustice in order to emphasize the cruel nature of the injustice'.<sup>3</sup> It was invariably for the advantage of the victim, his successors-in-title or his wife that other courts proceeded from the statelessness created by the decree of 1941. It was for humanitarian reasons that Sir Hersch Lauterpacht<sup>4</sup> argued forcefully that effect had to be given to the decree, however odious, in order not to impose a nationality upon persons who were most anxious not to possess it. Yet one can only conclude with Lord Cross of Chelsea<sup>5</sup> that 'it surely cannot be right for the question whether the decree should be recognized or not to depend on the circumstances of the particular case'.<sup>6</sup>

<sup>1</sup> This—jurisprudential—point was one of the principal reasons for the article mentioned at p. 44 n. 1, above, which seems to have resulted in the unusual procedural history of the decision in *Oppenheimer v. Cattermole*, *ubi supra*. <sup>2</sup> [1976] A.C. 249, at p. 263 C-D.

<sup>3</sup> It has been pointed out that the same thought may have influenced German courts on more than one occasion: above, p. 39 n. 4, p. 40 nn. 1, 4.

<sup>4</sup> 'The Nationality of Denationalized Persons' in *Jewish Yearbook of International Law*, 1948, p. 164. <sup>5</sup> [1976] A.C. 249, at p. 278 D-E.

<sup>6</sup> The question of German law decided by the House of Lords lies outside the purview of the present observations. Perhaps it is permissible to say very shortly that it is still believed that the result ought to have been based upon s. 25 of the Nationality Act of 1913 (although the House obviously disliked this reasoning). S. 25 operates automatically and, in particular, independently of the former national's state of mind or knowledge. Moreover, that the Constitution of 1949 should have deprived a German of his nationality is more than the 'oddity' of which Lord Cross of Chelsea speaks (p. 271 G-H). It may be that the House attached too much importance to the decision of the Federal Constitutional Court, 10 July 1958, *BVerfGE* 8, 81 or *IPRspr.* 1958/9 No. 215. This was a case in which an emigrant, having been naturalized in the United States, returned to Germany and, therefore, by virtue of Art. 116 sub-section 2, sentence 2 of the Constitution was deemed not to have been expatriated. The Court held that, the deeming provision having come into force only in 1949, the individual could not at the time of his earlier naturalization in the United States rely upon or retain his German nationality, which was apparently assumed to have been lost as a result of the expatriation. The case of Mr. Oppenheimer was different, because it is the very basis of the decision of 1968 that he had never lost his German nationality. It was not new legislation which in 1949 retrospectively made him a German. The distinction between the retrospective effect of legislation which is constitutive and the 'retrospective' effect of a judicial decision which is declaratory is well known. German comment on the point does not seem to be available. The result defended in this note seems to be approved by Drobnig, *American-German Private International Law* (1972), pp. 72, 73. But see Federal Administrative Court, 8 March 1977, *RzW.* 1977, 194.

## VI. CONFISCATIONS CONTRARY TO INTERNATIONAL LAW

## I

While there is no doubt that a State lacks international jurisdiction to take property situate outside its territory and such takings are, therefore, necessarily ineffective,<sup>1</sup> the international effects of the confiscation of property within the confiscating State's territory are in many respects unclear. At the same time they are of great practical importance; it may well be that they are the most important ones within the scope of the present survey, for confiscations are unfortunately frequent and the fate of what the Americans call 'hot products',<sup>2</sup> i.e. products confiscated in and by a foreign State and subsequently exported to and found in the forum State, is likely to come up often for judicial consideration.

Two questions stand out: What are the circumstances in which a taking of a foreigner's property is contrary to public international law? What are the international implications of an illegality thus established? The former question is outside the confines of the present discussion. This must assume the commission of an international wrong. Such an assumption is not unreasonable, for however obscure many details may be, certain principles may be taken to be firmly based. Thus an international wrong undeniably occurs where an alien's property is taken in breach of a treaty,<sup>3</sup> or where the taking is arbitrary, abusive or discriminatory and therefore has the character of punishment,<sup>4</sup> or where it is unaccompanied by the payment of or at least the clearly defined and readily enforceable right to compensation, whether it be reasonable, equitable, just, adequate or appropriate.<sup>5</sup> No lawyer familiar with, or willing to ascertain, the sources of international law<sup>6</sup> will find it difficult to prove the existence of these

<sup>1</sup> This rule is so obvious and so well established that it would be futile to refer to the enormous amount of supporting material. The only question is whether expropriation against compensation should have extra-territorial effect. The answer is in the negative. Not even a benevolent taking can have such effect: *Bank voor Handel en Scheepvaart v. Slatford*, [1953] 1 Q.B. 248.

<sup>2</sup> The expression occurs in the statement of 8 May 1974 by the Department of State concerning its policy with regard to such products: *Digest of United States Practice*, 1974, 275.

<sup>3</sup> This was the basis of the decision of the Permanent Court of International Justice in the *Chorzów Factory* case (Germany v. Poland), above, p. 2 n. 1. In the Indonesian cases far too little attention was paid to the Round Table Conference Agreements between the Netherlands and Indonesia, 27 December 1949, *United Nations Treaty Series*, vol. 69, pp. 3, 230-58. These Agreements deprived the Indonesian measures of any semblance of justification.

<sup>4</sup> See, for instance, Brownlie, *Principles of Public International Law*, 2nd edn. (1973), pp. 523, 524, 527, or O'Connell, *International Law*, 2nd edn. (1970), pp. 776-80, with further references. This merely constitutes, in the realm of international law, the application of principles developed in municipal law as a result of a long historical process: see Mann, 'Outlines of a history of expropriation', *Law Quarterly Review*, 75 (1959), p. 188.

<sup>5</sup> The importance of the various formulations should not be overrated. In the large majority of cases they do not matter, because in fact the property is simply taken and no compensation of any kind is effectively paid, with the result that in the end the victim or the State to which it belongs accepts a fraction of what is due even on the footing of the least generous formula.

<sup>6</sup> It may be helpful to indicate the sources which are relevant and the neglect of which constitutes the gravest criticism to which the *dicta* in the majority opinion of the Supreme Court of the United States of America in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1974), at pp. 428-30 *per* Mr. Justice Harlan, are exposed. Those sources include: (1) *Treaties*: It must



principles, but for present purposes it must suffice to profess adherence to them.

## II

Where the foreign State has taken property in circumstances which, for one or the other reason, are contrary to international law, the forum should treat the

suffice to mention the innumerable Treaties of Commerce concluded in the course of the current century and represented by the twenty-one Treaties of Friendship, Commerce and Navigation made between 1946 and 1971 by the United States of America and followed by numerous similar treaties such as treaties between the United Kingdom and Japan or Iran or between Germany and Italy, Portugal, Greece or Spain. All of them contain elaborate provisions against confiscation. In addition, between 1945 and May 1976 no less than 141 Treaties for the Protection of Capital Investments were concluded (see *Bilateral Treaties for International Investment* published in January 1977 by the International Chamber of Commerce). As a result of the most-favoured-nation clause the network created by these treaties is greatly extended. In the course of his recent discussion of the protection of private property by public international law Rigaux, *Droit public et droit privé dans les relations internationales* (Paris, 1977), p. 255, suggests that a minimum standard 'n'a jamais été reconnu comme tel ni par les États socialistes ni par les pays sous-développés ayant accédé à l'indépendance depuis 1945. Dans un ordre international essentiellement fondé sur l'adhésion tacite ou expresse des États, ce phénomène ne saurait être ignoré.' The treaties referred to establish the opposite and prove that the States contemplated by Rigaux and many of their supporters or defenders have a habit of being double-tongued; their standard is not the law, but their interest. (2) *Diplomatic Notes*: For a few recent examples see the Dutch Note, *American Journal of International Law*, 54 (1960), p. 484, or the American Note, *ibid.*, 68 (1974), p. 108, or the as yet unpublished British Note of 23 December 1971, where the classical principles are clearly stated and where it is expressly asserted 'that the measures in question amount to a breach of international law and are invalid'. And see the Department of State's declaration of 30 December 1975, *Digest of United States Practice in International Law*, 1975, pp. 488, 489. (3) *National legislation*: Reference should be made to numerous constitutional provisions (see the fourteen volumes of Blaustein and Flanz, *Constitutions of the World*) and to the equally numerous Investment Codes enacted in many countries (see the six volumes of *Investment Laws of the World* published by Oceana Publications Inc.). (4) *Judicial decisions*: Up to 1959 they were collected by Lord McNair, *Nederlands Tijdschrift voor Internationaal Recht*, 6 (1959), p. 218. Since then numerous decisions of municipal courts have become known which reaffirm the principle and to some of which reference will be made. Special weight should be attached to the *dictum* by Judge Gros in the *Case Concerning the Barcelona Traction, Light & Power Co.* (Belgium v. Spain), *I.C.J. Reports*, 1970, p. 275, who spoke of 'la règle de droit international prohibant les confiscations sans indemnité'. A clear statement of the rule is provided by the Austrian Constitutional Court, 15 October 1968, *Entscheidungen*, 1968, No. 5382 or *I.L.R.* 47, p. 40, where it was said that the seizure of a foreigner's private property 'is only permissible under international law against full and immediate compensation and that the taking of property has to be regarded as confiscation contrary to international law if full and immediate compensation is not forthcoming'. See the same Court, 24 June 1954, *I.L.R.* 21 (1954), p. 212. (5) *Academic opinion*: There is hardly any writer of standing who has failed to support the rule. It would be impossible to give a list which could claim any degree of completeness. (6) *State practice*: This is perhaps the most significant and the most interesting piece of evidence. The confiscators continue to recognize the rule by providing in their confiscatory legislation for compensation, though often in so circuitous, indefinite or vague a form as to make the pretence obvious. Numerous examples up to 1960 are collected by Mann, *Virginia Law Review*, 51 (1965), p. 604 or *Studies in International Law* (1973), p. 466, at pp. 479-83. Since then the same technique was followed by Bolivia in 1969 (*International Legal Materials*, 10 (1971), pp. 173, 182, 1113, 1201), Algeria, Libya and Chile in 1971 (*ibid.*, 10 (1971), p. 847; 11 (1972), p. 380; 10 (1971), p. 1067) or Iraq in 1972 (*ibid.*, 11 (1972), p. 380). The intended violation of a legal rule implies the recognition of its existence. If the confiscators think it right and necessary to provide for compensation they thereby prove the rule with which they pretend to comply and which in fact they disregard. They should be held to the appearance they create.



taking as null and void. In its courts the original owner should continue to enjoy title.

Such a result should cause no difficulty in countries in which public international law or its general or its generally recognized rules are directly applicable. Certain it is that in international law the rights and remedies against international wrongs are vested in the State whose nationality the victim possesses. Certain it is also that these comprise reparation in the sense of restitution in kind (which in the case of confiscation means return of the property<sup>1</sup>) or damages at the State's option, but, as we know, they do extend to the nullity of the wrongful act. When we come to the effect of the international rule in a municipal system of law, we must look to the latter for the appropriate solution, for international law expects and, indeed, requires municipal systems of law to observe and enforce it,<sup>2</sup> but prescribes no method of doing so. International law leaves it to municipal law to decide how obedience is to be achieved.<sup>3</sup> Hence municipal law is the source which indicates to the municipal judge the transformation of the international rule. The decisive question is not (as it has been wholly unjustifiably put in Germany<sup>4</sup>) whether there exists a generally accepted principle whereby *public international law* imposes upon the municipal judge the duty to treat an internationally illegal foreign act as void *ab initio*. That question was rightly answered in the negative, but misses the point altogether, for *ex hypothesi* public international law which, as a rule, addresses the State provides no answer.

Where, as is the almost universal practice, transformation of customary international law occurs, the judge will implement it in pursuance of the principle of effectiveness, i.e. so that within the national system of law the international rule can most effectively be worked out and the court can reach results most closely conforming to the international rule. Thus in Germany it is Article 25, in Italy Article 10, of the Constitution, in the Anglo-Saxon countries it is the common law which in regard to the foreign illegal confiscation permits and requires the recognition of the nullity contemplated by international law.<sup>5</sup> The victim's home State, it is true, may at any time dispose of the international claim and thus deprive the victim of any rights in national courts by a waiver of the wrong, by demanding financial compensation and thereby forgoing the nullity or by otherwise disposing of its subject's rights.<sup>6</sup> But so long as this has

<sup>1</sup> This example is expressly mentioned by Berber, *op. cit.* (above, p. 3 n. 6), at p. 25.

<sup>2</sup> See, generally, Brownlie, *op. cit.* (above, p. 3 n. 6), pp. 36-8 with numerous references, among them the cases mentioned above, p. 25 n. 6.

<sup>3</sup> This is stated expressly by Berber, *Lehrbuch des Völkerrechts*, 2nd edn. (1975), p. 107 or Dahm, *Völkerrecht*, vol. 1, p. 55 or Verdross and Simma, *Universelles Völkerrecht* (1976), pp. 56, 430, 431. See also Guggenheim, *Traité de droit international public*, 2nd edn. (1967), vol. 1, p. 70: 'En vertu d'une délégation du droit des gens, le droit étatique est chargé d'exécuter les règles de droit international public qui se rapportent à son domaine territorial.'

<sup>4</sup> Particularly in the decision of the Court of Appeal at Bremen, 21 August 1959, *IPRspr.* 1958 and 1959, 746, also I.L.R. 28, pp. 16, 24 sqq., and following it the District Court at Hamburg, 22 January 1973, *AWD.* 1973, 163 or *International Legal Materials*, 12 (1973), p. 251.

<sup>5</sup> See above, pp. 5 sqq.

<sup>6</sup> As a matter of international law there can be no doubt about these rights of the State; they were expressly recognized by the Federal Supreme Court of Germany: 22 June 1960,

not happened, nullity means invalidity or ineffectiveness on all levels, for and against all, independently of proceedings in international tribunals, and constitutes the remedy, indeed the only remedy, which by virtue of his municipal law is available to the municipal judge in order to give shape to the international facts and legal requirements.

This thesis<sup>1</sup> is, it is believed, in line with the most fundamental demands of justice, for notwithstanding a very odd *dictum* by an American court, fortunately in an entirely different context,<sup>2</sup> the Eighth Commandment 'Thou shalt not steal' surely is part of the law of nations, simply because, as the court admitted, 'every civilized nation doubtless has this as a part of its legal system'.<sup>3</sup> This is so even if modern positivists, particularly those who invoke positivism to oust or fetter the law, attempt to discredit the thesis as a product of natural law<sup>4</sup>—a description which, though intended to be derogatory, in fact carries the hallmark of commendation and dignity. Thus the Federal Supreme Court of Germany has impressively stated<sup>5</sup> that 'statute meets its limits where it is contrary to the generally recognized rules of public international law or to natural law', that in the event of such inconsistency municipal courts must start from the unlawfulness of the measure and that public international law 'as the inalienable kernel of law has precedence over all municipal law'. The fundamental approach which it is at this juncture intended to indicate has, as will appear, in the result much judicial and other support, but it may also claim specific endorsement by such authorities as, among many others, Sir Hersch Lauterpacht,<sup>6</sup> and Professors Verzijl,<sup>7</sup> Dahm<sup>8</sup> and Jennings<sup>9</sup> some of whose observations merit

*IPRspr.* 1960 and 1961 No. 61; 2 October 1963, *Archiv für Völkerrecht*, 1965, 331, 335. In the same sense *The Blonde*, [1922] 1 A.C. 313, at p. 335. The effect of such arrangements in municipal law is another matter.

<sup>1</sup> See already Mann, 'International Delinquencies before Municipal Courts', *Law Quarterly Review*, 70 (1954), p. 181 or *Studies in International Law* (1973), p. 366, and the German article 'Völkerrechtswidrige Enteignungen vor nationalen Gerichten', *Neue juristische Wochenschrift*, 1961, p. 705.

<sup>2</sup> *IIT v. Vencap Ltd.*, 519 F. 2d 1001 (1975), at p. 1015 *per* Judge Friendly.

<sup>3</sup> Cf. Art. 38 (1) (c) of the Statute of the International Court of Justice of which the American court may have been unaware.

<sup>4</sup> One of the most recent of such attempts is made by Behrens, *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 37 (1973), p. 394, particularly pp. 404, 418. The extent of this author's positivist efforts in the interest of the immunity of confiscatory measures is astonishing. The requirements of public international law are described as relative and optional, the question of the public interest involved in a taking as well as the question of the discriminatory character of a taking are said to be non-justiciable.

<sup>5</sup> *BGHZ.* 3, 94 (197); *BGHStr.* 1, 391 (399); also Federal Administrative Court, *NJW.* 1961, 2225.

<sup>6</sup> Sir Hersch Lauterpacht in Oppenheim, *International Law*, vol. 1, 8th edn. (1955), pp. 269, 270; *Cambridge Law Journal*, 12 (1954), p. 20.

<sup>7</sup> 'The Relevance of Public and Private International Law for the Solution of Problems arising from Nationalization', *Festschrift für Makarov, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 19 (1958), p. 531.

<sup>8</sup> *Völkerrecht*, vol. 1 (1958), pp. 264, 270.

<sup>9</sup> 'Nullity and Effectiveness in International Law', *Cambridge Essays in International Law* (1965), p. 80. The list could be considerably extended. It must be sufficient to mention a few others: Martin Wolff, *Das internationale Privatrecht Deutschlands*, 3rd edn. (1953), p. 12; Kraus, *Festschrift für Laun* (1953), p. 234; Niederer, *Festschrift für Lèwald* (1953), pp. 547, 554; Wortley, *Expropriation in Public International Law* (1959), pp. 17, 18, 155; Verdross and Simma, *Universelles Völkerrecht* (1976), p. 589.



quotation, though the scholar may do well to ponder the whole of his thoughtful exposition:

If, then, the claim to compensation and the claim to reparation are quite different claims in law, with different parties, and if the latter arises when there is already not only a failure to satisfy the former but even an impossibility of satisfying the former, it follows that it is not at all logical or even permissible to explain the situation in terms of a mere outstanding obligation to pay compensation. And it would seem to follow from this that it is both logical and proper for a municipal court to refuse to recognize, i.e., to treat as a nullity for all purposes of the forum, a foreign expropriation decree that fails to satisfy any international rule requiring the payment of prompt compensation.

### III

The strength of the thesis which has just been developed is frequently obscured by an invidious and arid problem of methodology which has already been discussed,<sup>1</sup> but must in the present context be resumed on account of the special significance given to it. It is said that, while any violation of international law as such, committed as a result of the foreign confiscation, is legally immaterial in the forum, it is or at least may be contrary to its *ordre public* and on this ground incapable of recognition. Public policy is, of course, a conception which has much wider scope than international law; thus it may well invalidate in the forum a foreign measure which by international law is not open to criticism, for instance because the victim is a national of the confiscating State and no violation of human rights, such as discrimination on grounds of religion or race, arises.<sup>2</sup> But where a violation of international law is in issue it should make no difference whether non-recognition is based on the international rule or on *ordre public*, for the difference should be little more than a verbal and, therefore, unattractive one. This is particularly so if one remembers that where courts invoke *ordre public*, they in substance affirm the general rules of international law or contribute to their formation, for what is material to the creation and to the evolution of a general principle of public international law is often the result reached rather than the precise legal reasoning on which it rests. How irrelevant the problem of method is can readily be shown by the decision of the House of Lords in the case of *Oppenheimer v. Cattermole*<sup>3</sup> to which reference was made in another connection. It was held that a foreign 'breach of international law' and

<sup>1</sup> Above, pp. 31 sqq.

<sup>2</sup> In the Chilean copper case, which was recently decided by the District Court at Hamburg (above, p. 48 n. 4) and which has led to a disproportionately large literature in Germany, the victim of the confiscation was a Chilean corporation in which the Chilean State held 51 per cent and an American corporation held 49 per cent of the share capital. It is difficult to see how any question of international law could arise in this case. The plaintiff was held to be a 'split corporation' represented by a Hamburg lawyer as a curator and said to be of German nationality: District Court Hamburg, 13 March 1974, *AWD*. 1974, 410 or *International Legal Materials*, 13 (1974), p. 1115. These are processes of artificiality which outside Germany should be considered wholly inadmissible, although in unexplained circumstances a similar course was taken in *Banco Nacional de Cuba v. Sabbatino*, above, p. 46 n. 6; see on this point Mann, *Studies in International Law*, p. 466 n. 2.

<sup>3</sup> *Oppenheimer v. Cattermole*, [1976] A.C. 249, 278 per Lord Cross of Chelsea.



a violation of human rights could not be recognized in England, because 'it is part of the public policy of this country that our courts should give effect to clearly established rules of international law', and similar evidence of international law being treated as a head of public policy can be found elsewhere.<sup>1</sup> Whether one considers a foreign violation of international law as a nullity on account of its character *per se*, or on account of its inconsistency with the domestic public policy, is not a matter worthy of prolonged discussion and one will, therefore, be inclined to shrug one's shoulders at German attempts to construct a difference without a distinction, that is to say, to deny the relevance of a violation of international law, yet to condemn the same violation by means of public policy.<sup>2</sup> It is, indeed, paradoxical for a public international lawyer so to proceed and to end by developing on many pages the view that in relation to foreign illegal confiscations a generous resort to public policy is required and that, therefore, 'the courts of the forum should refuse recognition to all acts of foreign States which in the eyes of the court are contrary to international law'.<sup>3</sup> This is precisely what, particularly in Germany, can be done by giving effect to the nullity provided for by international law and transformed into German law by the Constitution.

The difference, however, becomes material and, moreover, dangerous if it is utilized for the purpose of condemning the foreign delict, yet neutralizing its effect by asserting the absence of a sufficiently intensive link between the facts of the case and the forum (*Binnenbeziehung*). The requirement of such a link is a universal feature of the doctrine of *ordre public* and also exists in English law, although legal terminology ignores a technical term for it.<sup>4</sup> The reach of the doctrine within the context of foreign illegal confiscations is probably limited to a single type of case (which renders the methodological point referred to even more trivial). On the one hand continental courts which so far have alone had occasion to consider the point have held the necessary link to exist whenever the plaintiff is a national of the forum State<sup>5</sup> or a foreigner, but the subject of

<sup>1</sup> See, e.g., the approach by Lipstein, *Recueil des cours*, 135 (1972-I), pp. 190, 191 or Jennings, loc. cit. (above, p. 49 n. 9), p. 81.

<sup>2</sup> Both the decisions mentioned at p. 48 n. 4, above, proceed in this fashion, though in the end they reject *ordre public* for the reason presently to be mentioned in the text.

<sup>3</sup> In this sense Seidl-Hohenveldern, 'Völkerrechtswidrige Akte fremder Staaten vor innerstaatlichen Gerichten', in *Recht im Wandel*, p. 591, 618.

<sup>4</sup> See above, p. 35.

<sup>5</sup> In this sense the Federal Supreme Court of Germany, *BGHZ*, 28, 385; Kegel, *Internationales Privatrecht*, p. 239 or Soergel-Kegel, Art. 30 n. 17. The same thought underlies the very important decision *BGHZ*, 39, 220 (232). It is, however, doubtful whether the nationality of the plaintiff should really be allowed to matter where a violation of the law is concerned. Cf. the strange study by Sperduti, *Mélanges Charles Rousseau* (1974), p. 249: he first tries to prove that, notwithstanding such provisions as Art. 10 of the Italian Constitution, 'il manque dans l'ordre juridique du for une norme d'adaptation au droit international qui qualifie d'illicite une expropriation étrangère'. He then says that *ordre public* does not help, because it 'tend à sauvegarder des principes fondamentaux de l'ordre juridique du for et non point des principes étrangers'—as if the maintenance of international law was not a major interest of the forum. But he concludes that 'l'ordre public . . . réagit vis-à-vis de la violation du droit international perpétrée au préjudice d'un citoyen, en privant l'acte étranger illicite de la possibilité de produire, dans le for, tout effet juridique utile quelconque.'

a State whose nationals are entitled by virtue of a treaty to what is known as national treatment, i.e., to the same treatment as nationals;<sup>1</sup> in view of the far-flung network of most-favoured-nation clauses this is, as must again be emphasized, a most significant extension to which effect should be given even in countries such as Britain<sup>2</sup> in which treaties of commerce or similar instruments are not usually incorporated into the domestic legal system. Moreover, if the defendant is a national of the forum State and claims to be interested in the property the link is said to exist; this is so both where he claims to have acquired title and where he acts merely as a sales agent earning commission.<sup>3</sup> On the other hand the link is allegedly missing where the defendant is merely in possession of the property which he holds for another.<sup>4</sup> The result is unconvincing, for it is also generally admitted that the graver the violation of (international) law is the looser the link may be to justify the intervention of *ordre public*. A flagrant international wrong should invariably be deemed to be so grave a matter as to be contrary to the public policy of the forum. It is an absolute wrong and leaves no room for a doctrine of relativity.

While, therefore, there should be no disadvantage in relying upon *ordre public* rather than international law, one can perhaps discern a slight advantage in doing so. Public policy is determined by the conceptions of law, justice and morality prevailing in the forum. Public policy is independent of the attitude adopted in foreign States. The latter is not necessarily or universally exemplary. If, as some believe, it were necessary to take account of the views of all countries in order to ascertain the general principles of law recognized by civilized nations or, in other words, of international law it would, in the present world, be almost impossible and certainly difficult to discover the common standard. Fortunately international law does not require universality of practice, but considers only the practice of civilized nations. In the result, therefore, there should be no practical difference between the standards of international law and the demands of public policy, though it must be admitted that in most civilized countries the latter can more readily be met.

#### IV

Whichever route judicial practice has followed, the legally relevant reasoning has largely been in harmony with the preceding suggestions, even though the actual result of the decisions may, on factual grounds or on account of the

<sup>1</sup> This is a significant point upon which the decision of the Federal Supreme Court, *BGHZ*, 39, 220 (232) rests.

<sup>2</sup> A treaty, not incorporated into English law, cannot normally provide a head of public policy so as to require observance in defiance of the general law: see the discussion by Mann, *Studies in International Law*, pp. 340-4. The point mentioned in the text is, however, different. What the judge has to do is to assess the scope of public policy. If, in doing so, he has regard to the nationality of the plaintiff he should not exclude from the benefits granted to a British subject such foreigners as can invoke treaty rights.

<sup>3</sup> This was so decided by the Court of Appeal at Bremen, above, p. 48 n. 4.

<sup>4</sup> In this sense the District Court at Hamburg, above, p. 48 n. 4, but there is much academic opinion against this view. See, in particular, Stoll (Staudinger), n. 219 after Art. 12 and Seidl-Hohenveldern, *AWD*, 1974, 427, among others.

specific appreciation of the character of foreign events, have differed from what could be expected. Those decisions have not always been analysed with the precision they merited. A short comparative survey cannot, therefore, be dispensed with.

The strongest lead was given by the *French* Cour de Cassation which for half a century has consistently refused to recognize confiscations carried out in the Soviet Union, Spain or Algeria.<sup>1</sup> In recent years it employed the often repeated formula

Aucun effet de droit ne peut être reconnu en France à une dépossession opérée par un État étranger sans qu'aucune indemnité équitable soit préalablement fixée.

To the French Cour de Cassation we also owe one of the clearest rejections of the relevance of the merely verbal, unperformed and frequently disingenuous promise of compensation:<sup>2</sup>

que semblables dispositions de pur principe, qui, après dépossession immédiate, laissent le soin à l'Administration de fixer, dans un délai indéterminé et discrétionnairement, une indemnité en indiquant seulement le montant qu'elle ne pourrait pas dépasser, sont contraires à l'ordre public français.

This point was strongly made in *Switzerland*<sup>3</sup> and *Austria*<sup>4</sup> also, but it misled *Japanese* courts<sup>5</sup> and lower *Italian* courts:<sup>6</sup> while they decided clearly that a title acquired by a foreign State in violation of international law would not be recognized they considered the vaguest of promises to pay compensation sufficient to legitimate the foreign takings. No such error occurred in the *United States of America* where, after many vicissitudes, Cuban confiscations were treated as ineffective to transfer title on the ground that they were so discriminatory as to be contrary to international law;<sup>7</sup> this meant

<sup>1</sup> Cass. Req., 5 March 1928, *Clunet*, 1928, 674; Cass. Civ., 11 March 1939, *Clunet*, 1939, 615; Cass. Civ., 23 April 1969, *Clunet*, 1969, 914 and numerous other decisions published only in the *Bulletin*, but collected *Revue critique de droit international privé*, 1970, p. 751; 1971, p. 796; 1973, p. 775. See in particular the decision Cass. Civ., 17 November 1969, *Bulletin civil*, 1969 I no. 343. The frequently repeated formula was also applied in the Chilean copper case decided by the President of the 1st Chamber of the Tribunal de grande instance in Paris, 19 November 1972, *Clunet*, 1973, 227. See, generally, Batiffol-Lagarde, *Droit international privé*, vol. 2 (1976), no. 523.

<sup>2</sup> Cass. Civ., 23 April 1969 (above, n. 1).

<sup>3</sup> Federal Tribunal, 25 September 1956, *BGE*, 81 I 196, 199 or I.L.R. 23 (1956), pp. 24, 26.

<sup>4</sup> Supreme Court, 3 February 1954, *Revue critique de droit international privé*, 1956, p. 259. Constitutional Court, 15 October 1968, *Entscheidungen*, 1968 No. 5382 or I.L.R. 47, p. 412, at p. 416. In the same sense as to Czechoslovakia the United States Foreign Claims Settlement Commission re *Wyman's* claim, 14 September 1962, I.L.R. 40, p. 97.

<sup>5</sup> Court of Appeal at Tokyo, I.L.R. 20 (1953), p. 305.

<sup>6</sup> Court of first instance in Venice, 11 March 1953, *Foro Italiano*, 1953, vol. 2, p. 719 or I.L.R. 22 (1955), p. 19; Court of first instance in Rome, 13 September 1954, *Revue critique de droit international privé*, 1958, p. 519 or I.L.R. 22 (1955), p. 23. For a more realistic and wholly satisfactory appreciation see, however, Court of Appeal, 28 April 1956, *Rivista di diritto internazionale*, 40 (1957), p. 264 which is likely to supersede the decisions mentioned in the preceding sentence. Cf. the decision of the Italian Supreme Court, 19 April 1960, I.L.R. 40, p. 17. But see also the *dicta* in the decision of the Corte di Cassazione, 14 November 1972, *Italian Yearbook of International Law*, 1975, p. 238, at p. 251.

<sup>7</sup> *Banco Nacional de Cuba v. Farr Whitlock & Co.*, 383 F. 2d 166 (1967), cert. den. 390 U.S. 956



that, in accordance with the more recent and, one is tempted to say, the more enlightened attitude of both the legislative<sup>1</sup> and executive<sup>2</sup> branch of the Government of the United States the Act of State doctrine no longer applies to illegal confiscations. Accordingly the law of the United States is now in harmony with that of *Holland*<sup>3</sup> and, in particular, *Britain*,<sup>4</sup> where foreign confiscations which are discriminatory are incapable of transferring title. What is still an open question in these countries is whether the non-payment of compensation for the property of an alien is accepted as a violation of international law recognizable by municipal courts.<sup>5</sup> The Federal Supreme Court of *Germany*, like the *Swiss* Federal Tribunal, has not yet had an opportunity of dealing with the fate of 'hot products', but the general tendency of both courts' decisions seems to justify the expectation that they will allow the true owner to recover them.<sup>6</sup> Nevertheless it must be noted with regret that lower German courts have not yet established a firm practice: takings in the Soviet zone of occupation<sup>7</sup>

(1968), which followed the earlier decision of the same court in *Banco Nacional de Cuba v. Sabbatino*, 307 F. 2d 845 (1962) and thus brought the *Sabbatino* litigation to an end.

<sup>1</sup> Above, p. 30 n. 2.

<sup>2</sup> Its recent attitude appears from the Statements referred to above, p. 15 n. 2; p. 46 n. 6. If one compares these recent statements with views expressed by the same Department of State in the course of and after the *Sabbatino* litigation (*International Legal Materials*, 2 (1963), pp. 1012, 1019, and 3 (1964), p. 1077), the radical change of attitude becomes obvious. It is, indeed, most welcome. On the general problem see Henkin, 'Is there a "Political Question" doctrine?', *Yale Law Journal*, 85 (1976), p. 597 and, in particular, Henkin, *Foreign Affairs and the Constitution* (1972), where the problem is dealt with on pp. 210-16—unfortunately a little shortly.

<sup>3</sup> This was clearly decided by the Supreme Court, 17 October 1969, *International Legal Materials*, 9 (1970), p. 758—a decision which in other respects is difficult to follow and probably unconvincing. As to Indonesian measures which were held to be contrary to *ordre public*, see Supreme Court, 17 April 1969, I.L.R. 40, p. 7 and Court of Appeal Amsterdam, 4 June 1959, I.L.R. 30, p. 28.

<sup>4</sup> On this point the decision of Upjohn J. (as he then was) in *Re Helbert Wagg & Co. Ltd.*, [1956] Ch. 323, 344 sqq., is quite clear: the learned Judge did not challenge the decision in *The Rose Mary*, [1953] 1 W.L.R. 246 on the ground that the confiscation by Iran there in issue was discriminatory in character. It would have been absurd if in the latter case a British court had not found a way of retaliating against a hostile act specifically directed against Britain or British interests.

<sup>5</sup> On this point Upjohn J. (see preceding note) thought that *Luther v. Sagor*, [1921] 3 K.B. 532 and *Princess Paley Olga v. Weisz*, [1929] 1 K.B. 718 included *dicta* of such general nature and impact that the principles there laid down also extended to cases in which the property of persons was involved who are subjects of a State other than the confiscating State. The *dicta* in those cases have frequently been analysed and criticized. They have had a most unfortunate influence, though no one doubts the correctness of the actual decisions in these cases. It can only be hoped that Upjohn J.'s interpretation will one day be reviewed by a higher court in the light of the learning to which those decisions have given rise and much of which should carry considerable weight. This applies, in particular, to Professor Lipstein's contributions.

<sup>6</sup> As to Germany see the general approach of the cases mentioned above, p. 49 n. 5, and the tendency of such cases as LM No. 2 on s. 96 EVO (decision of 28 February 1956); BGHZ. 31, 168; 39, 220 to which Arndt in Erman (6th edn.), Art. 30 n. 9 rightly attaches great importance. As to Switzerland see the decisions collected by Frank Vischer, *Internationales Privatrecht* (1973), pp. 659, 660, who believes 'hot products' should be recoverable if the defendant knew of the confiscation or if this was discriminatory.

<sup>7</sup> Court of Appeal Hamburg, *IzRspr.* 1945-53 No. 7a; Court of Appeal, Oldenburg, *ibid.*, p. 22; District Court Mannheim, *ibid.*, No. 7; in the same sense Raiser, *Süddeutsche Juristenzeitung*, 1950, p. 279. For the opposite view see Court of Appeal Nuremberg, *IzRspr.* 1945-53 No. 5; District Court Berlin, *ibid.*, No. 3 and No. 5.

as well as takings of Indonesian tobacco to the detriment of Dutch owners<sup>1</sup> and of Chilean copper<sup>2</sup> have been recognized, but takings by Czechoslovakia of the property of Sudeten Germans<sup>3</sup> were held to be illegal and invalid.

In the result there appears to be a substantial body of judicial practice which in a very wide variety of factual circumstances allows the dispossessed owner to recover his property. The survey which could be undertaken for present purposes is far from complete. It also fails to analyse the prevailing practice in depth. A more comprehensive and more detailed investigation could easily assume excessive proportions, but would be unlikely to achieve more than to fill in rather than revise the picture that has emerged.

## V

There remains the task of defining a little more closely the consequences which the nullity flowing from the illegality of the confiscation entails.

1. The chattel confiscated in a manner considered to be internationally illegal should be treated as having been stolen. The original owner, therefore, has retained his title except where a subsequent purchaser in accordance with the general law of the *lex situs* has acquired it. Where title to stolen property can be acquired at all, the purchaser will usually have to act without actual or constructive notice. If the person in possession of 'hot products' knows their origin he may also become liable in damages to the true owner, not only for such a tort as conversion, but also for conspiracy committed by co-operating with others to deprive the true owner of his rights.

2. The nullity extends not only to the transfer of title to chattels or movable property generally, but also to immovables. The latter effect will usually be without international relevance, but special circumstances may occur. Thus it may happen that timber cut in confiscated forests can be found and identified in the forum. It is submitted that the true owner should be allowed to recover it.<sup>4</sup> The broad principle from which nullity is derived requires the court to look at the substance of the matter rather than legal technicalities. The fact that at the moment of confiscation the timber formed part of the land and that the latter, by its very nature, is not and cannot be a 'hot product' found in the forum should not make any difference. Similar considerations apply to coal or oil which at the moment of confiscation is in the ground and by virtue of the *lex situs* belongs to the owner of the land.

3. Does this also apply if the coal or oil in the ground belongs to the confiscating State and according to the *lex situs* becomes the property of the owner of the mining rights only at the time of extraction by him? In other words, does

<sup>1</sup> Court of Appeal Bremen, above, p. 48 n. 4.

<sup>2</sup> District Court Hamburg, above, p. 48 n. 4.

<sup>3</sup> Court of Appeal Munich, *IPRspr.* 1950-1 No. 5 or *Clunet*, 1954, 1012; Court of Appeal Nuremberg, *ibid.*, No. 13; Court of Appeal Hamburg, *IPRspr.* 1952-3 No. 36; District Court Kassel, *IPRspr.* 1945-9 No. 3. In the same sense the majority of authors, in particular Beitzke, *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 15 (1949), p. 145.

<sup>4</sup> Such a case came before the Austrian Supreme Court. Its decision in the opposite sense is criticized by Schwind, *Handbuch des österreichischen internationalen Privatrechts* (1975), p. 274.



the nullity of the taking comprise such chattels as at the moment of confiscation were the property of the plaintiff as well as chattels title to which the plaintiff would have acquired if there had been no confiscation? It is submitted that the answer to these questions should be in the affirmative and that, in particular, the local law relating to the acquisition of title should not be allowed any relevance at all.<sup>1</sup> As the Federal Supreme Court of Germany has said, if the substance of the property has not changed hands, the fruits of property cannot have a different fate.<sup>2</sup> If an international illegality has occurred, the acquisition by the confiscator of the fruits of the property is as illegal and, therefore, as void as the acquisition of the thing itself. In the words of the Permanent Court of International Justice<sup>3</sup> the latter is to be wiped out, so consistency no less than justice requires the former to be wiped out as well. A broad brush is necessary, for the law relating to the acquisition of title by the owner of mining rights who is not the owner of the land is very technical and varies from country to country. International law, when it assesses the consequences of an international delinquency, does not take account of legal technicalities or refinements, nor can the wrongdoing State expect it to do so. Any different view would impose upon the plaintiff a burden of proof which as a rule he cannot discharge and which in any event would be so elusive as to render the plaintiff's rights illusory or, to look at the other side of the coin, to allow the wrongdoing State to enjoy the benefit of its tortious act. This the law ought not to allow.

4. A much more difficult question arises where a process of manufacture is interposed by the confiscator. Suppose a car-manufacturing business has been illegally confiscated. Suppose that at the moment of confiscation there were in the factory finished cars as well as raw materials from which after the date of the confiscation cars were produced. Can the dispossessed owner recover both types of cars? If the preceding submissions are correct he can certainly recover the former. But the same should apply to the latter. The line will, however, have to be drawn if the confiscator buys raw materials and then uses them to manufacture cars. Even if all the raw materials were bought with money found in the confiscated business the right of recovery probably cannot extend to the cars produced from them. They constitute a new departure and their connection with the confiscation is too remote.

5. A question of some practical importance relates to the validity of an insurance contract made by or on behalf of the confiscator in regard to 'hot products'. If they are in the same category as stolen goods then by the law of most countries the insurance contract would not be concluded for the purpose of protecting a lawful interest of the assured in the goods. Goods obtained in pursuance of an international wrong are to be considered as stolen. No valid insurance contract can, it is submitted, be made in respect of them.<sup>4</sup>

<sup>1</sup> Court of first instance of Syracuse, 15 February 1972, *International Legal Materials*, 13 (1974), p. 114 is, therefore, wrong.

<sup>2</sup> BGHZ. 39, 220, at p. 230.

<sup>3</sup> Above, p. 2 n. 1.

<sup>4</sup> The 'purchaser' does not have a right in or against the property, as required by *Stockdale v. Dunlop*, (1840) 6 M. and W. 224. As to Germany see Federal Supreme Court, 24 May 1962, *NYW*. 1962, 1436; 22 June 1972, BGHZ. 59, 82.



6. The effects described in the preceding paragraphs should occur wherever the victim is the subject of a State other than the confiscator. It does not matter whether the victim is a national of the forum State or of a third State. Such a distinction could possibly be material within the sphere of *ordre public*, but even there no country ought to adopt so parochial an attitude as to grant rights to its subjects which it refuses to grant to foreigners. If international law is applied to reject the consequences of the foreign illegality there would in any event be no room for the distinction. On the other hand, where the victim is a national of the confiscating State no international responsibility falls to be considered except where the foreign State's act amounts to a violation of human rights. This may happen in the event of arbitrary discrimination on some such ground as political views, religion or race, and where it occurs the law of civilized nations should not hesitate to interfere.

## VII. BREACH OF CONTRACT AND INTERNATIONAL WRONG

### I

If one asks in what circumstances an international wrong committed by a foreign State may involve a breach of a contract made by the same State with an alien, the field, properly analysed, is very limited, for the question makes sense only where three conditions coincide.

In the first place the contract must be governed by the law of the State which is a party to the contract and has committed the wrong. If the contract is governed by any other legal system, the breach is most unlikely to be in any sense legally relevant. Thus a contract of concession granted, but wrongfully repudiated or modified, by a given State in law necessarily continues to exist unaffected if it is governed by the law of another State or by international law (assuming the latter alternative to be possible<sup>1</sup>). Discharge or variation of a contract is subject to its proper law. This will not recognize interference by another legal system except as a fact creating impossibility of performance. Even so, it is hard to imagine any legal system which would allow a party to a contract to rely on self-induced impossibility to get rid of its legal obligations or to bring a contract to an end against the will of the other party to it.

Secondly, in the present context the contracting State's intervention must be

<sup>1</sup> It was first developed in 1944: Mann, *this Year Book*, 21 (1944), p. 11 or *Studies in International Law* (1973), p. 179; see further *this Year Book*, 35 (1959), p. 34 or *Studies in International Law*, p. 211 or (in German) *Jus et Lex* (Festschrift für Max Gutzwiller, 1959), p. 465, and more recently *Revue belge de droit international*, 1975, p. 562 (the author is not responsible for the numerous printing errors of this publication). Since 1944 the subject has produced an enormous amount of academic discussion. The contributions by Professors Prosper Weil, *Recueil des cours*, 128 (1969-III), p. 101, Böckstiegel, *Der Staat als Vertragspartner ausländischer Privatunternehmen* (1971) and Sacerdoti, *I Contratti tra Stati e Stranieri nel Diritto Internazionale* (Milan, 1972) deserve special mention. See also O'Connell, *op. cit.* (above, p. 3 n. 6), pp. 978 sqq. As to concessions in particular see Peter Fischer, *Die internationale Konzession* (1974), on whom see Mann, *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 41 (1977), p. 185. See also Roland Brown, *Modern Law Review*, 39 (1976), p. 625.

not merely a simple breach of contract, but so grave and so specific a breach as to constitute an international wrong. If the contract provides, for instance, for the building of a harbour and the contracting State does not pay the sums due from it or does not accept delivery or, while the work proceeds, evinces an intention not to perform some obligation and thus repudiates the contract, and such repudiation is (or is not) accepted by the contractor, a simple breach of contract occurs with which the law is familiar and upon which, for present purposes, it is unnecessary to enlarge. But if the State passes legislation purporting to discharge or vary the contract, then it becomes a matter of significance to ascertain whether the legislation is general and irreproachable in character, scope and purpose or has the specific quality of an international wrong<sup>1</sup> and whether, for this reason, in a foreign tribunal it is deprived of the effect which legislation enacted by the proper law usually has. The building contract may include a clause allowing the contractor to employ foreign labour. A general law prohibiting or restricting the employment of foreign labour will hardly ever be internationally wrongful. It would be different if it applied to the particular contractor only, because in such event it would in all probability be discriminatory or arbitrary, or if there was a denial of justice. It may be suggested with some force that the question whether this type of legislation is an international wrong is otiose, for it would in any event be contrary to the *ordre public* of most States. The distinction is, or at least ought to be, in most municipal tribunals without practical import, unless, of course, any such tribunal takes the narrow and unsatisfactory view that *ordre public* cannot be resorted to in the absence of a link based on the nationality of one of the parties or some similar national

<sup>1</sup> For the legal basis of the distinction drawn in the text see Mann, 'State Contracts and State Responsibility', *American Journal of International Law*, 54 (1960), p. 572 or *Studies in International Law* (1973), p. 302. If the contract as a whole is subject to the law of the legislating State neither logic nor justice nor authority can support the suggestion that, in its effect upon the State's contracts, general legislation of a wholly unobjectionable type should be treated as a breach of contract. The submission of a contract to the proper law implies the submission to the law of the country as it is from time to time (for references see Mann, *The Legal Aspect of Money*, 3rd edn. (1973), pp. 304, 305 and add Upjohn J. (as he then was) in *Re Helbert Wagg & Co. Ltd.*, [1950] Ch. 323, at pp. 341, 342, 353, 354). There is no exception in cases in which the legislating State is a party to the contract (see, e.g., the Supreme Court of Norway, 2 May 1962, mentioned by Mann, *The Legal Aspect of Money*, p. 126, n. 7). No rule of international law has become known which would render it an international tort for a State on the level of municipal law to rely on its own legislation. To invoke *pacta sunt servanda* does not help in a case in which by its very nature and the law supporting it the *pactum* is liable to become subject to new legislation. Nor is it possible to suggest a proprietary right in the continued existence of legislation rendering the contract immune: *French v. Banco Nacional de Cuba*, 23 N.Y. 2d. 46 (1968), at p. 55 *per* Chief Judge Fuld, approving Mann, *The Legal Aspect of Money*, p. 495. The discussion by Delaume, *Transnational Contracts*, vol. 1. (1975), pp. 20 sqq. does not meet these points and lacks persuasiveness. Although in parts Jennings, this *Year Book*, 37 (1961), p. 156 gives a different impression, he does not in substance differ from these submissions (see his conclusions 2, 3 and 5 on pp. 181, 182). They are also supported by Sir Gerald Fitzmaurice, this *Year Book*, 37 (1961), p. 64, to a large extent by Weil, *Recueil des cours*, 128 (1969-III), pp. 226-9 and Brownlie, *op. cit.* (above, p. 3 n. 6), p. 530 or O'Connell, *op. cit.* (above, p. 3 n. 6), pp. 986 sqq. with numerous references. That a State cannot avoid its responsibilities arising under public international law by invoking its municipal law is *nihil ad rem*. It is, of course, possible that expressly or impliedly contracting parties submit only part of the contractual relationship to the law of the contracting State; this is a special case which does not lend itself to analysis in general terms.



interest.<sup>1</sup> Since such a view is reflected in judicial practice and implies a sharp distinction between non-recognition on the ground of *ordre public* and non-recognition on the basis of international law and since, moreover, the question of an international delict may have to be decided in a truly international court, it will be assumed that the legislation in issue does amount to what may fairly be described as a breach of international law.<sup>2</sup>

Thirdly, the issue before the court must be a contractual rather than a proprietary one. It must concern, for instance, the continued existence of the contract. Where, possibly as a result of or in connection with the dissolution of the contract, property is taken, the rules discussed in the preceding chapter apply.

If, and only if, these three conditions are fulfilled there arises the question of what effect, if any, such internationally wrongful legislation enacted under the auspices of the proper law will be accorded by a tribunal outside the legislating State.

## II

It is submitted that legislation which involves an international wrong leaves the contractual relationship unaffected, for it will be disregarded as unworthy of recognition and, consequently, the rights and liabilities of the parties remain in full force and effect, just as they would do in the more familiar case of *ordre public* precluding the application of some foreign statute. Of course, the legislation, so we assume, involves repudiation of the contract, to use English terminology to describe an event that all legal systems are conversant with. Repudiation which is wrongful and not accepted by the innocent party is everywhere incapable of discharging the contract. It must be so,<sup>3</sup> for otherwise the wrongdoer could at will terminate his contractual duties and leave it to the innocent party to pursue a claim for such damages as he can prove. No legal system has become known in which so perverse a result prevails. It would be tedious to refer to the innumerable legal systems in which the opposite rule is established. One is confronted with one of those elementary rules of which one can only say: let those who assert the absurd come forward and prove it.

This, therefore, is not a situation to which the idea of reparation would be germane. Where the contractual tie exists or is deemed to exist (because in law the wrongful act cannot be allowed any effect, however different the factual position created in defiance of the law may appear), it is performance which is

<sup>1</sup> See above, p. 35.

<sup>2</sup> It has frequently been suggested that such a breach occurs in any event in those numerous cases in which the contract includes a clause submitting it to the law of the contracting State as existing at the time of the contract, or a clause precluding the State from passing or relying upon subsequent legislation. But whether a breach occurs depends in the first place on the proper law. If such clauses are overridden by new legislation of a general and unobjectionable nature, which is sanctioned by the proper law, no breach of contract nor any international illegality can be established. None of the relevant headings applies, because anyone contracting with a State on the footing of such State's law must be taken to have assumed the risk of new and inconsistent legislation. As was shown in the paper mentioned at p. 58 n. 1, above, in so far as the American Constitution creates an exception, it cannot be generalized. For a particularly valuable discussion see Weil, *Mélanges Charles Rousseau* (1974), p. 301.

<sup>3</sup> See above, p. 9.



due from both parties, though in some legal systems the innocent party may be entitled to withhold performance, while the other party is in default.

To take an example, assume the oil concession which Libya granted to British Petroleum Ltd. in 1957 had been subject to Libyan law.<sup>1</sup> The Libyan Nationalization Act of 7 December 1971<sup>2</sup> purported to cancel it. Suppose the concession had included an arbitration clause and an arbitration tribunal sitting in, for example, Geneva found the Libyan legislation and the repudiation of the concession inherent in it clearly contrary to public international law in that it was enacted for purely extraneous political reasons and was arbitrary and discriminatory in character. Suppose further the arbitrators had to decide the question whether in law the concession continued to exist, not merely for the purpose of their own jurisdiction,<sup>3</sup> British Petroleum having refused to accept the repudiation and the British Government not having waived the international tort. If, as mentioned, the Act of 1971 was rejected as an international illegality or, in the language of the British and American Diplomatic Notes on the subject,<sup>4</sup> was 'invalid', the answer can only be in the affirmative. The opposite would be tantamount to denying the fundamental and universal principle of the binding force of contractual obligations.<sup>5</sup> Accordingly it has been impossible to find any legal provision, any decision or any author of repute asserting the almost paradoxical theory that, as a matter of law, an illegal breach committed

<sup>1</sup> In fact it was not so subject. The clause read: 'This concession shall be governed by and interpreted in accordance with the principles of law of Libya common to the principles of international law and in the absence of such common principles then by and in accordance with the general principles of law, including such of those principles as may have been applied by international tribunals.' See Delaume, *Transnational Contracts*, vol. 1 (1975), p. 46 who discusses this clause and correctly concludes that 'the general principles constitute the test whereby Libyan law retains a vocation to govern the relationship, since in the event of a contradiction the general principles would prevail'. (For a similar clause see Art. XXI of the Concession Agreement between Egypt and Esso of 1974 in *International Legal Materials*, 14 (1975), p. 915.) In fact the clause renders international law paramount and primarily applicable. Under the first part of the clause, Libyan law and international law must coincide; in other words, if and in so far as Libyan law does not conform to international law it is inapplicable and one has to turn to the second part of the clause which renders general principles of law applicable. But this is merely another description for international law. The general principles of law are nothing else than one of the sources of international law (see Art. 38 (1) (c) of the Statute of the International Court of Justice). They are not a legal system which alone can give life and legal force to a contract. Nor can it be assumed that parties intend to submit their contract to rules which do not constitute a law, a legal system, but merely one of its sources. The distinction is by no means a purely verbal one. There is no general principle of law which would preclude a State from enacting legislation which interferes with or even abrogates contracts governed by its law and covers contracts made by itself; such legislation occurs everywhere and extremely frequently without objection. But where international law applies, a State is precluded from relying on its own legislation to limit the scope of its international obligations (see above, p. 25). On this point, in particular, see the article of 1975 mentioned at p. 57 n. 1, above, at p. 567.

<sup>2</sup> *International Legal Materials*, 11 (1972), p. 380.

<sup>3</sup> That an arbitration clause survives the discharge of a contract by an accepted repudiation was decided in England by the House of Lords in *Heymann v. Darwins Ltd.*, [1942] A.C. 356, and is likely to be the law in most countries. It would also seem to be international law: *Council of I.C.A.O. case*, *I.C.J. Reports*, 1972, p. 54; *Fisheries Jurisdiction case*, *I.C.J. Reports*, 1973, p. 3; see, in particular, Judge Sir Gerald Fitzmaurice's Separate Opinion, at p. 31.

<sup>4</sup> For references see above, p. 46 n. 6.

<sup>5</sup> It would be wrong to accumulate quotations in support of an elementary principle. See, however, above, p. 9.

by one party brings the contract to an end against the will of the other party. To revert to the example given, no reasonable person would deny that in Libya the concession came to an end in fact and perhaps in law. But the assumption is that a tribunal outside Libya has held the Libyan legislation to be inapplicable in law. Hence, in the eyes of such a tribunal, it cannot be allowed any effect. This is the inexorable consequence of the violation of public international law or, if one prefers it, of *ordre public*.

To avoid misunderstanding two further thoughts should be added.

The innocent party may decide at a time exclusively to be determined by itself<sup>1</sup> to accept the repudiation and thus to terminate the contract as from the date of such acceptance. The consequence would be that that party's rights would then become limited to damages of such an amount as to afford it as far as possible *restitutio in integrum*. Moreover, in most legal systems the innocent party will be entitled to damages even while, in the absence of acceptance, the contract is in existence. But the type and amount of such damages is quite different from those due for the loss of the contract as a whole.

Further, by the law of some countries certain types of contract concluded by the State are subject to termination by it either at discretion or *sub modo*, either conditionally or unconditionally, the condition usually being the payment of compensation or the absence of a contractual renunciation of the right by the State. Where this is the law, the termination of the contract in accordance with it would not be a breach. Discharge of a contract in a manner authorized by the proper law and conforming to the *lex fori*'s notions of public international law or *ordre public* will inevitably meet with recognition and raises no problem requiring academic discussion. The assumption on which the present discussion proceeds is, however, quite different.

### III

It is against the background of the effect of an internationally wrongful breach of contract by a State under the substantive rules of the proper law as applied and recognizable by the forum that it is now possible to turn to the distinct question of the remedies available to the innocent party in such forum.

Difficulty arises only where the innocent party has not accepted the repudiation brought about by the breach of contract which *ex hypothesi* is treated by the forum as flowing from the legislation enacted by the State party. If the repudiation has been accepted the idea of reparation and of damages enters the picture. Whether such damages are to be paid in money or whether and in what circumstances the innocent party is entitled to restitution in kind (as, for instance, it would frequently be under the German Civil Code) is a question for the *lex fori*, for it relates to the remedy and raises procedural matters. It would be pointless and, moreover, wrong to allow a tribunal, usually an arbitration tribunal, to make an order for restitution in kind if according to the *lex fori* such an order was not permitted or could not be enforced. The

<sup>1</sup> Municipal legal systems do not seem to prescribe any time limits. As to international law see above, pp. 10 sqq.



question, therefore, is in substance the same as that which arises when the repudiation is not accepted and the innocent party asks for an order for specific performance rather than a declaration of the continuing existence of the contract.

This, again, is a matter for the *lex fori*<sup>1</sup> which in the only material case of arbitration is the same as the procedural law of the country where the arbitration tribunal has its seat, or the *lex arbitri* as it was called in 1967<sup>2</sup> and is now widely described; different views, it is true, have from time to time been put forward,<sup>3</sup> but experience shows that the *lex arbitri* is almost universally followed by arbitrators, including arbitrators on State contracts,<sup>4</sup> and has to be followed if they wish to avoid the risk of rendering an award which is null and void or liable to be set aside or to be held unenforceable. Specific performance may be subject to general limitations, as in the Anglo-American countries. Or the respondent State may, under its own law, be exempt from an order for specific performance (as the Crown is in the United Kingdom), and the same may apply to the State of the forum. Or it is possible that under the proper law of the contract specific performance is excluded in clearly defined types of contract to which the contract in issue belongs; such contracts may therefore at the outset suffer from certain congenital infirmities which a foreign tribunal may not be able to disregard. In short, it is difficult to generalize, as Professor Schwebel felt able to do in one of the few studies devoted to the subject, viz. an article<sup>5</sup> which, significantly, is entitled 'Speculations on Specific Performance of a Contract between a State and a Foreign National'. He starts from the assertion<sup>6</sup> that 'the question of the remedies which the law affords for violation of a contract depends on what law governs the contract and upon the terms of the contract itself'. With respect to the learned author, this is hardly accurate. If the proper law of the contract does not allow the innocent party the right to insist upon the performance of the contract, the question whether the *lex fori* would allow it does not arise. If, on the other hand, the proper law (which, we know, may be international law) does, or is deemed to, allow such a right, then it is for the *lex fori* to say whether under its procedural law it will enforce that right by granting the remedy of specific performance. A detailed investigation of the relevant

<sup>1</sup> Dicey and Morris, *Conflict of Laws*, 9th edn. (1973), pp. 1101, 1119.

<sup>2</sup> '*Lex facit arbitrum*', in *International Arbitration (Liber amicorum for Martin Domke)*, p. 160.

<sup>3</sup> Notably by Gentinetta, *Die lex fori internationaler Handelsschiedssprüche* (1973), on whom see Mann, *Rebels Zeitschrift für ausländisches und internationales Privatrecht*, 38 (1974), p. 763. The view expressed in the text does not rest on doctrine, but on hard facts, that is to say, on the legal texts to be found in most countries and often giving the courts power to a larger or smaller extent to supervise or interfere with arbitration proceedings pending within their jurisdiction. See, e.g., ss. 1025 sqq. of the German Code of Civil Procedure; Art. 1019 of the French Code de procédure civile: 'les arbitres et tiers arbitres décideront d'après les règles du droit, à moins que le compromis ne leur donne pouvoir de prononcer comme amiables compositeurs'; the English Arbitration Act 1950; and most significantly the Swiss Concordat which applies to every arbitration (Art. 1) which has its seat within the meaning of Art. 2 in one of the participating Cantons, and according to which the procedure is subject to Federal law, unless the parties or failing them the arbitrators have within the limits permitted by Art. 25 adopted a different procedure (Art. 24).

<sup>4</sup> See Mann, 'State Contracts and International Arbitration', this *Year Book*, 42 (1967), p. 1 or *Studies in International Law*, p. 256.

<sup>5</sup> *Rights and Duties of Private Investors Abroad* (1965), p. 201.

<sup>6</sup> *Ibid.*, p. 202.



legal systems, including their special rules relating to State contracts, will be required; Professor Schwebel seems to conclude<sup>1</sup>

that the case for according specific performance may be more compelling as respects a contract between a State and a foreign national than as respects one between a State and its citizen. Admittedly, the distinctions between the cases are not conclusive. And, whatever their force, the fact that specific performance normally is not afforded against a State in the national sphere suggests that it normally will not be accorded in the international sphere. An international lawyer would not counsel his international client prudently were he to advise that specific performance is a remedy to be expected.

With this comment one could readily agree if it referred to claims made in national tribunals; but it appears under the heading of 'Specific Performance in International Law',<sup>2</sup> and in that sphere it would, as has been submitted,<sup>3</sup> be unfounded: there is no reason at all why an international tribunal (with which the present chapter is not concerned) should not be able and entitled to make a decree of specific performance for the benefit of the plaintiff State which grants diplomatic protection to enforce 'a contract between a State and a foreign national'. On the other hand, when speaking about arbitrations on contracts between States and aliens<sup>4</sup> (which necessarily proceed on a national level and are subject to the *lex arbitri*) Professor Schwebel probably goes too far in the opposite direction when he suggests<sup>5</sup> that 'specific performance may well be the remedy which is more than a cure—the remedy which can give new life to the living law of a contractual relationship'. In practice it will not often be possible in law or useful in fact for a tribunal in the forum State to order a foreign State specifically to perform a contract made by it. Within the territory of the respondent State such an order will in any case be unenforceable, because even if it will recognize the tribunal at all it will not recognize the holding that the legislation terminating the contract is refused application—and such a holding must be the foundation of any award made against the respondent State. Outside its territory the rules relating to immunity of execution, among other obstacles, will make enforceability of an order for specific performance even more speculative and futile than the enforceability of a money judgment against a foreign State, which in turn is hardly anywhere enforceable. If, in addition, by the *lex arbitri* the arbitrators are not assured of jurisdiction to make an order for specific performance against a foreign State or at all, their award as a whole may be vulnerable. The result, therefore, is that, except on the level of truly international proceedings, specific performance is a very dubious remedy against a foreign State and that a prudent claimant should not claim and a national court or arbitrator should not grant it except after the most careful and comprehensive investigation of the legal position in the relevant legal systems.

This, then, leaves the declaratory judgment or award as the only other remedy to establish (but only to establish) the rights of the party to a State contract

<sup>1</sup> *Rights and Duties of Private Investors Abroad* (1965), p. 210.

<sup>3</sup> Above, p. 13.

<sup>4</sup> Loc. cit. (above, n. 1), p. 210.

<sup>2</sup> Ibid., p. 206.

<sup>5</sup> Ibid., p. 212.

which has failed to accept the State's repudiation of the contract. Such a remedy is readily and almost always and everywhere available to the innocent party, and it may in particular include a forthright declaration to the effect that the contract continues to be in force. Practically all legal systems permit declaratory relief,<sup>1</sup> and even where judicial discretion comes into the picture they are most willing to grant it just in cases in which no other effective remedy is available so as to clarify the legal rights and duties of the parties. In England, where at the time no order for the reinstatement of a wrongfully dismissed employee, i.e., no order for specific performance of the contract of service, could be made, it was even held that the court could declare the wrongful dismissal to be invalid; the purpose of the declaration was 'to make it clear to all the world what was the plaintiff's position in the eyes of the law'.<sup>2</sup> Accordingly, he who asks for a declaration as to his rights does not ask either for *restitutio in integrum* (reparation) or specific performance. The three remedies are entirely distinct. Nor is the distinction subtle. It is an elementary one, and an extraordinary confusion of thought would be required to suggest that where the claimant is not entitled to reparation in the sense of restitution in kind or to specific performance he is also excluded from declaratory relief. It may well be that by virtue of its moral force, though by no means as a matter of law, a declaratory judgment may in exceptional circumstances be similar in effect, though not in character, to an order for specific performance. Where the respondent State is told by the declaratory order what its obligations are and decides to implement them, it in fact acts as if an order for specific performance had been made against it. Such an attitude would be rare, but welcome and a tribute to the authority of the law. But in the strictly legal sense it is voluntarily adopted. There were, indeed, times when claimant States thought that, when making a claim in an international court, they should confine themselves to claiming a declaration, because if granted it could reasonably be expected to be implemented by the respondent State.<sup>3</sup> No reasonable person could or would wish to describe this as a subtle device and to refuse a declaration on the ground that in reality an order for specific performance is requested, but would have to be refused. Such reasoning could only be described as perverse, for it would test the actual and plainly permissible order requested by the plaintiff by an order which is not requested and which, if it were requested, would be entirely different in legal character.

The conclusion, therefore, is that the innocent party who has not accepted the repudiation by illegal legislation of a contract by the State party to it is entitled to have the continued existence of the contract and the legal rights and liabilities flowing therefrom clarified and established by a declaratory judgment or award. Indeed, so long as the repudiation has not been accepted (and in law it does not ever need to be accepted and acceptance certainly cannot be imposed by the defaulting State), a declaration may be the only remedy of relative

<sup>1</sup> See the impressive survey in Edwin Borchard *Declaratory, Judgments*, 2nd edn. (1941).

<sup>2</sup> *Vine v. National Dock Labour Board*, [1957] A.C. 488, at p. 504 *per* Lord Morton of Henryton.

<sup>3</sup> Above, p. 10.

effectiveness which is available to the innocent party and which no judge or arbitrator can reasonably withhold. While an order for the payment of money or specific performance would almost invariably be unenforceable against the wrongdoing State and, therefore, useless, a declaration would not only vindicate the innocent party in the eyes of the world, but might also serve as a defence or as *res judicata* in other proceedings and thus have some value for the victim.

While this paper went through the press, part of an Award rendered by Professor Dupuy on 19 January 1977 in a dispute between two American companies and Libya was published.<sup>1</sup> It arose from oil concessions which had been granted apparently in 1971 and which Libya was alleged to have broken by nationalizing the companies' Libyan property in 1973 and 1974. The claims were for a declaration<sup>2</sup> that the concessions 'ont un caractère obligatoire' (which one would have thought to be obvious), that as a result of the nationalization Libya 'a manqué aux obligations découlant par elle des contrats' and that Libya was 'tenue d'exécuter les contrats et de leur donner plein effet'. In substance the Sole Arbitrator, in the absence of the respondent State, so held except that he seems to have intended to make an order for *restitutio in integrum*<sup>3</sup> rather than for a declaration. The discussion is elaborate, though the question of the nullity of the nationalization was not in terms referred to. Professor Dupuy in effect decided in favour of nullity, though the odd terms of the application<sup>4</sup> compelled him to talk in terms of restoration.<sup>5</sup> With the possible exception of the third remedy granted, the result is in conformity with the preceding submissions, and the same applies to much of the reasoning.

<sup>1</sup> *Clunet*, 1977, p. 350. It does not appear where the seat of the arbitration was. Some observations of Mr. J.-F. Lalive, however, indicate that the Arbitrator held the arbitration to be subject to public international law (p. 324). For the reasons developed in the paper referred to above, p. 62 n. 4, this was an indefensible conclusion. It was perhaps also a dangerous one: Klein, in *International Law and Economic Order (Essays in honour of F. A. Mann)*, p. 617.

<sup>2</sup> *Clunet*, 1977, p. 350.

<sup>3</sup> *Ibid.*, pp. 387, 388.

<sup>4</sup> *Ibid.*, p. 350.

<sup>5</sup> *Ibid.*, pp. 380-8.





# RESERVATIONS TO NON-RESTRICTED MULTILATERAL TREATIES\*

By D. W. BOWETT<sup>1</sup>

THE law relating to reservations to multilateral treaties has manifestly undergone a great deal of change over the last thirty years. The Pan-American Union had developed a somewhat special practice<sup>2</sup> and in 1951 the International Court of Justice delivered its opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*<sup>3</sup> which, in effect, confirmed that, once the function of the multilateral treaty as a 'legislative' instrument was accepted, it was no longer appropriate to apply to reservations to such an instrument rules which assumed the function of the instrument to be that of a contract. The International Law Commission, after several years of uncertainty over the Court's new doctrine, ultimately accepted it and so, in due course, it became embodied in the Vienna Convention on the Law of Treaties.<sup>4</sup> It would be surprising if this history of change had been achieved without leaving State practice in a somewhat uncertain state. It is the purpose of this article to clarify certain questions about which, it would appear from State practice, some uncertainty still remains. The article is confined to the study of reservations to 'non-restricted' multilateral treaties, by which is meant those treaties covered by Article 20 (4) of the Vienna Convention, namely treaties which are neither constituent instruments of an international organization nor treaties reservations to which require the consent of all Parties because 'the limited number of the negotiating States and the object and purpose of the treaty' make it evident that 'the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound', to use the terms of Article 20 (2).

## I. THE MEANING OF A 'RESERVATION'

It is essential to clarify, from the outset, what is meant by a 'reservation'. The definition contained in Article 2 of the Vienna Convention states:

reservation means a unilateral statement, however phrased or named, made by a State when signing, ratifying, accepting, approving or acceding to a treaty, whereby it

\* © Dr. D. W. Bowett, 1977.

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<sup>2</sup> See the statement of this practice in the *Publications of the I.C.J.*, 1951, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Pleadings*, pp. 15-20.

<sup>3</sup> *I.C.J. Reports*, 1951, p. 15.

<sup>4</sup> A/CONF. 39/27, 23 May 1969. The literature on this development of new rules relating to reservations, culminating in the Vienna Convention, is vast: for a comprehensive collection see the *Selected Bibliography on the Law of Treaties* (A/CONF. 39/4) prepared by the U.N. Secretariat for the Conference.

purports to exclude or modify the legal effect of certain provisions of the treaty in their application to that State. . . .

The core of the difficulty is to distinguish a true reservation from what may be termed an interpretative declaration. The particular label attached to the statement cannot be conclusive, for a State can no more avoid having its unilateral statement treated as a reservation by calling it an interpretative declaration than it can insist upon an interpretative declaration's being treated as a reservation, merely because it has labelled it as such. The International Law Commission was well aware of this distinction. In its Commentary on Article 2 it stated:

States . . . not infrequently make declarations as to their understanding of some matter or as to their interpretation of a particular provision. Such a declaration may be a mere clarification of the State's position or it may amount to a reservation, according as it does or does not vary or exclude the application of the terms of the treaty as adopted.<sup>1</sup>

Thus, the test is not the nomenclature but the effect the statement purports to have. The test is whether the statement seeks to exclude or modify the legal effect of the provisions of the treaty.

By way of example, one can take the 'reservation' made by the U.S.S.R. to Article 11 (1) of the Vienna Convention on Diplomatic Relations of 1961: it was termed a 'reservation' in contrast to the 'declaration' made concerning Articles 48 and 50. Yet its operative part was as follows:

. . . considers that any difference of opinion regarding the size of a diplomatic mission should be settled by agreement between the sending State and the receiving State.<sup>2</sup>

Given that Article 11 allowed the receiving State to limit the size of a mission only in the absence of agreement, Australia did not regard this 'as modifying any rights or obligations under that paragraph'.<sup>3</sup> In short, it was not a true reservation.

One can also conceive of the situation in which a State characterizes its unilateral statement as an interpretative declaration, but by the terms of the statement makes it clear that it is prepared to become a Party only on the basis that its own interpretation is accepted. If the interpretation offered were quite inconsistent with the plain meaning of the words, and with what the other Parties

<sup>1</sup> *Yearbook of the I.L.C.*, 1966, vol. 2, pp. 189-90, para 11. During the Vienna Conference an attempt by Hungary to assimilate reservations and interpretative declarations was firmly resisted by the Expert Consultant (and Rapporteur of the I.L.C.), Sir Humphrey Waldock: *United Nations Conference on the Law of Treaties, Official Records, First Session, Summary Records of Plenary Meetings and of Meetings of the Committee of the Whole*, p. 137, 25th Meeting of Committee of the Whole, 16 April 1968.

<sup>2</sup> *Multilateral Treaties in respect of which the Secretary-General performs Depositary Functions* (ST/LEG/SER. D/9), p. 57.

<sup>3</sup> *Ibid.* Nor did Belgium, Canada, Denmark, France, Malta, New Zealand, or the United Kingdom. Yet Luxembourg objected to it as a 'reservation' and the Federal Republic of Germany regarded the reservation as 'incompatible with the letter and spirit of the Convention': *ibid.*, p. 58. This is unfortunate language for its meaning is obscure. It is clearly not intended to mean the same as 'incompatible with the object and purpose of the Convention', for the Federal Republic uses this orthodox phrase in relation to other reservations.



intended, as reflected in the *travaux préparatoires*, what would then be the position? It might be thought right to treat such a statement as a reservation, despite the State's insistence that it is an interpretative declaration. The difficulty about that course is that the other Parties would almost inevitably treat the statement as an impermissible reservation, and this would lead, as we shall see, either to disregarding the 'reservation' as a nullity or, if not severable and contrary to the object and purpose of the treaty, to rejecting treaty relations entirely. The State making the declaration might feel justifiably aggrieved by such reactions to its interpretative declaration. The better course, therefore, would be to accept the declaring State's own characterization, but refuse to accept the interpretation and thus force the issue to some form of independent adjudication as a matter of treaty interpretation. There would seem to be no objection, in principle, to regarding the State's participation in the treaty as being in suspense, until the point of interpretation was adjudicated or otherwise settled. This would be in accord with the State's own insistence that it would become a Party only on the basis that its own interpretation be accepted. The one course clearly wrong would be to accept an interpretative declaration which the accepting State regards as contrary to the meaning of the treaty as intended by all the Parties.

There may be other cases in which an objecting State may be unsure whether to treat a unilateral statement as a reservation or an interpretative declaration and may cover both possibilities with a dual formula. Thus, in relation to a Yugoslav declaration on ratifying the 1968 Non-Proliferation Treaty the United Kingdom stated that 'in so far as the statement may be intended to take effect as an interpretative declaration, Her Majesty's Government regret that they are unable to accept it . . . in so far as it may be intended to take effect as a reservation, Her Majesty's Government must place on record their formal objection to the statement, on the grounds that it is incompatible with the object and purpose of the Treaty'.<sup>1</sup>

However elusive the distinction may be in certain cases, the consequences of this distinction are important. If the statement is an interpretative declaration, although other Parties may accept it, when some Parties do not accept it there is no question of this non-acceptance operating as if it were an objection for the purposes of Articles 20 and 21 of the Vienna Convention, so as to exclude the affected provision or even to exclude the treaty from entering into force between the 'reserving' State and 'objecting' States. All that results from an objection is a dispute about the interpretation of the affected provision, and this may in due course have to be resolved through any disputes procedures provided in the treaty or, if there are none, by any of the other available procedures for resolving disputes over the interpretation of a treaty.

The practical difficulty which may arise is that either the 'reserving' State or the 'objecting' State may take the view that the statement is a true reservation and thus that, by reason of the terms of the objection, there is no treaty in force between the two States. However, this should not be a practical difficulty where

<sup>1</sup> *United Kingdom Treaty Series*, No. 125 (1975) (Cmnd. 6268), p. 10.

there exists an already agreed and binding disputes settlement procedure, for the principle is well-established<sup>1</sup> that a Party may not rely on its unilateral interpretation of the validity of the very treaty which is in issue before a legal tribunal, or upon which the jurisdiction of the tribunal itself is based. It will be for the tribunal to determine, first, the nature of the statement, i.e., whether it is a true reservation or an interpretative declaration, and then to conclude what the effect of that might be upon its jurisdiction: such questions cannot be pre-determined by one of the Parties.

## 2. THE DISTINCTION BETWEEN PERMISSIBLE AND IMPERMISSIBLE (OR PROHIBITED) RESERVATIONS

This distinction derives from the will of the Parties in that they may either prohibit certain reservations,<sup>2</sup> expressly or by necessary implication, or expressly authorize certain reservations, or be deemed to have prohibited such reservations as would be incompatible with the whole object and purpose of the treaty.

Article 19 of the Vienna Convention postulates the general freedom to formulate a reservation at the time of signing, ratifying, accepting, approving or acceding to a treaty, but then continues with the important proviso:

. . . unless:

- (a) the reservation is prohibited by the treaty;
- (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
- (c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

Thus, in a treaty which contains no reservations article,<sup>3</sup> the principal criterion will be whether the reservation is compatible with the object and purpose of the treaty. In a treaty which does contain a reservations article, on the other hand, it may be assumed that the Parties will have excluded the power to formulate reservations in the case of all articles which are crucial to the treaty, in the sense that reservations to such articles would frustrate the object and purpose of the treaty. However, the effect of Article 19 is to make this presumption irrebuttable, in the sense that (c)—the ‘incompatibility’ criterion—operates only where the treaty does not either prohibit the reservation

<sup>1</sup> See *Fisheries Jurisdiction* case (U.K./Iceland), Jurisdiction of the Court, Judgment of 2 February 1973, *I.C.J. Reports*, 1973, para. 14; also *Appeal relating to the Jurisdiction of the I.C.A.O. Council* (India/Pakistan), Judgment of 18 August 1972, *I.C.J. Reports*, 1972, para. 16.

<sup>2</sup> The Vienna Conference saw a determined effort by the U.S.S.R. (amendment A/CONF. 39/C.1/L.115), supported by certain other States such as Roumania and Czechoslovakia, to establish the principle that States have an unlimited right to make reservations: see *United Nations Conference on the Law of Treaties, Official Records*, loc. cit. (above, p. 68 n. 1), p. 107, 21st Meeting, 10 April 1968, para. 5. It is clear that Article 19 does not accept an unlimited right to make reservations, and in fact the U.S.S.R. amendment was decisively rejected by 70 votes to 10, with 3 abstentions (ibid. p. 135, 25th meeting, 16 April 1968, para. 23).

<sup>3</sup> The absence of a reservations article is likely to result not from inadvertence but from disagreement over whether reservations are to be permitted to particular articles: see Sir Ian Sinclair, *United Nations Conference on the Law of Treaties, Official Records*, loc. cit. (above, p. 68 n. 1), p. 114, 21st Meeting, 10 April 1968.



or permit specified reservations, not including the reservation in question. Or, to put the matter the other way round, there is no place for the 'incompatibility' criterion in relation to a reservation which is prohibited (expressly or impliedly<sup>1</sup>) or which is expressly permitted. It should be noted, however, that this exclusion of the 'incompatibility' criterion operates in relation to treaties with specified reservations, and that is not the same as specified articles to which reservations may be made. In other words, if the treaty specifies as prohibited or permitted the actual reservations which may be formulated, there is no place for the 'incompatibility' criterion: but if the treaty merely provides that reservations (unspecified as to type or kind) may be made to particular articles of the treaty, this does not exclude the 'incompatibility' criterion in relation to such reservations.

This distinction between reservations which are specified as permissible (and which need no subsequent acceptance unless the treaty so requires)<sup>2</sup> and the specification of articles to which reservations may be made is of extreme importance. Let us take an example of the former. The European Convention on the Place of Payment of Money Liabilities of 16 May 1972 provided in Article 7 that:

The provisions of the Convention or of Annex I hereto shall not be subject to any reservation with the exception of that referred to in Annex II to this Convention.

And Annex II went on to provide that:

Any of the States mentioned hereafter may, at the time of signature or when depositing its instrument of ratification or acceptance of the Convention, declare that it reserves the right not to apply the provisions of Article 3 of Annex I:

Italy  
The Netherlands.<sup>3</sup>

There one has a clear example of a *specified* reservation, expressly permitted, and being so specified there can be no question about its permissibility, for the Parties are expressly agreed that the two named States are entitled to reserve the right not to apply Article 3. It would follow that, having so agreed, the Parties need not subsequently accept such reservations when made, and they would certainly be debarred from objecting to such reservations.

<sup>1</sup> There was some doubt whether the 'incompatibility' criterion does apply to reservations which are only *impliedly* authorized: see the Indian delegate, *United Nations Conference on the Law of Treaties, Official Records*, loc. cit. (above, p. 68 n. 1), p. 128, 24th Meeting, 16 April 1968, para. 30. Although the matter is not entirely clear, it would seem that provided the prohibition is clear (as with a formula such as 'reservations are only permitted to Articles x-y', which clearly, although impliedly, prohibits reservations to all other articles) the incompatibility criterion is excluded. There is a different question of whether, in relation to reservations falling under Article 19 (c)—or outside Article 19 (a) and (b)—an objecting State is confined to objecting on the ground of incompatibility. The answer is clearly No. See Sir Humphrey Waldock's reply, *ibid.*, p. 133, 25th Meeting, para. 3.

<sup>2</sup> Article 20 (1).

<sup>3</sup> *European Treaty Series*, Council of Europe publication, No. 75. For other examples of quite specifically permitted reservations see *The Treaty Maker's Handbook* (1973), ed. Blix and Emerson, Section 14; in particular the 1954 Convention relating to Civil Procedure, Article 32; the 1949 Revised General Act for the Pacific Settlement of Disputes, Article 39.



As an example of a treaty which does not specify the permissible reservations, but only the articles to which reservations may be formulated, let us take the 1958 Geneva Convention on the Continental Shelf,<sup>1</sup> Article 12 of which expressly permitted reservations other than to Articles 1, 2 and 3. However, Article 12 did not specify the particular reservations which were authorized, and the agreement of the Parties did not extend to agreeing on the permissibility of specific reservations. It is thus not possible to state *a priori* that, being reservations to a 'permissible' article, the reservations are by definition 'permissible'. Such reservations may not be permissible; and even if they are permissible they not only require acceptance, but may also be objected to.

For example, on ratifying the Continental Shelf Convention, France made the following reservations to Article 6:

In the absence of a specific agreement, the Government of the French Republic will not accept that any boundary of the continental shelf determined by application of the principle of equidistance shall be invoked against it:

- if such boundary is calculated from base-lines established after 29 April 1958;
- if it extends beyond the 200-metre isobath;
- if it lies in areas where, in the Government's opinion, there are 'special circumstances' within the meaning of Article 6, paragraphs 1 and 2, that is to say: the Bay of Biscay, the Bay of Granville, and the sea areas of the Straits of Dover and of the North Sea off the French coast.<sup>2</sup>

This complex 'reservation' is in marked contrast to the Venezuelan reservation made on ratification which was in the following terms: '... with express reservation in respect of article 6 of the said Convention'.<sup>3</sup> There can be little doubt of the permissibility, under Article 12, of a reservation which excludes Article 6 *in toto*. The position of a complex 'reservation' such as the French reservation is by no means so clear, and its permissibility cannot be assumed simply on the ground that it is, or purports to be, a reservation to an article to which reservations are permitted.

The question then arises, by what criteria can the permissibility of a 'reservation' to an article to which reservations are permitted be judged? It is suggested that the following are all relevant criteria.

(i) *Whether the 'reservation' is a true reservation or an interpretative declaration*

To revert to the example of the French 'reservations' to the Continental Shelf Convention, it may be doubted whether the third, 'special circumstances', reservation is a reservation at all. It does not seek to vary or modify the rule about shelf boundaries in Article 6, but rather relies on the very terms of Article 6 which provide for 'special circumstances', and seeks to have those terms applied in the specifically named areas of Bay of Biscay, Bay of Granville etc.

<sup>1</sup> A/CONF. 13/L.55.

<sup>2</sup> *United Nations Treaty Series*, vol. 499, p. 311. Texts of reservations in *Multilateral Treaties in respect of which the Secretary-General Performs Depositary Functions* (ST/LEG/SER. D/9), p. 488.

<sup>3</sup> *Ibid.*, p. 489.

Thus, the French third reservation is in the nature of an interpretative declaration, which Parties may, or may not, accept. As indicated earlier, the importance of this distinction is that, not being a true, permissible reservation, for those Parties which do not expressly accept it, all one has is a dispute about interpretation: there can be no question of a failure to object's constituting an acceptance, and no question of an objection's operating to exclude from the treaty bond between France and the objecting State any part of Article 6. Nor could the objecting Party regard the treaty as not in force between itself and France.

(ii) *Whether the 'reservation' is in fact a reservation to the particular article to which it purports to be attached*

Obviously, if a treaty permits reservations to some articles but not to others, it cannot be possible for a Party to make reservations to articles to which reservations are *not* permitted, simply by purporting to attach the reservations to articles to which reservations are permitted.

To revert again to the example of the French reservations, it may be argued that the second reservation—excluding the equidistance principle where the boundary is prolonged beyond the 200-metre isobath—is in effect an attempt to circumscribe the definition of the outer-limit of the shelf, and that is covered by Article 1 of the Convention to which reservations are not permitted.<sup>1</sup>

(iii) *Whether the 'reservation' is in effect an attempt to vary or modify rules of law which do not derive from the treaty in question but derive either from some other treaty or from customary international law*

A Party cannot, under the guise of a reservation to an article to which reservations are permitted, seek to find acceptance for a legal proposition which is at variance with, or even concerned with, rules of law based upon some quite different treaty or even rules of customary international law.

In the *North Sea Continental Shelf* cases the International Court, having made the point that it is common to allow reservations to 'purely conventional rules', went on to distinguish rules of customary law in these terms:

... whereas this cannot be so in the case of general or customary law rules and obligations which, by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour.<sup>2</sup>

There is evidence from State practice to support this demonstrably sound proposition.

For example, in acceding to the 1971 Treaty on the Prohibition of the Emplacement of Nuclear Weapons and other Weapons of Mass Destruction

<sup>1</sup> This view receives some support from the French 'declaration' on Article 1 which echoes the French dissatisfaction with the potential extension of the shelf pursuant to the 'exploitability' criterion in Article 1.

<sup>2</sup> *I.C.J. Reports*, 1969, pp. 38-9.

on the Seabed and the Ocean Floor and in the Subsoil thereof,<sup>1</sup> India made a statement<sup>2</sup> which, in effect, asserted that no foreign State could use the continental shelf of another for military purposes. The 1971 Treaty did not in fact cover that proposition, so that the Indian declaration raised in issue the degree of exclusiveness of coastal State jurisdiction which was a matter governed by the 1958 Geneva Convention, a treaty expressly safeguarded by Article IV of the 1971 Treaty: in short, the Indian statement was irrelevant to the 1971 Treaty. Not surprisingly, therefore, the United States Government replied by Note dated 4 October 1973<sup>3</sup> disagreeing with this Indian statement as a proposition of law and emphasizing that 'any and all rights existing under international law prior to the conclusion of the [1971] Treaty and not falling within its prohibitions remain unaffected'.

Or, if one reverts to the first of the French 'reservations' to the 1958 Continental Shelf Convention—concerning base-lines established after 29 April 1958—it may be argued that the validity of base-lines is governed not by the Continental Shelf Convention but by either the rules contained in the 1958 Convention on the Territorial Sea and Contiguous Zone *or* customary international law. It would follow, on this argument, that France cannot make a reservation about such rules, or base-lines based on such rules, under the guise of a reservation to Article 6 of the Continental Shelf Convention. It would of course be perfectly proper for France to challenge the legality of particular base-lines, on the grounds that they do not conform with international law, but France has no need of a reservation to preserve such a right of challenge. The matter might be otherwise if the French 'reservation' were to be regarded not so much as a challenge to the validity of post-1958 baselines *per se*, but simply as a statement that, whilst not necessarily challenging those baselines, they would not be accepted by France for the purposes of drawing a continental shelf boundary unilaterally, without the agreement of France.

(iv) *Whether the reservation is compatible with the object and purpose of the Treaty*

One must assume that a precise, specified reservation which is expressly permitted cannot be incompatible with the object and purpose of the Treaty. That apart, any reservation which is not prohibited must satisfy the 'compatibility' criterion.<sup>4</sup>

<sup>1</sup> *United Kingdom Treaty Series*, No. 13 (1973) (Cmnd. 5266). Of course, it is always possible for the parties, by agreement, to vary customary rules in their treaty regime (assuming the rules are not part of the *jus cogens*.)

<sup>2</sup> *Ibid.*, No. 123 (1973) (Cmnd. 5510), p. 8.

<sup>3</sup> *Ibid.*, No. 57 (1974) (Cmnd. 5945), p. 9. Yet a further example is the Spanish 'declaration' on the legal effect of Article 10 of the Treaty of Utrecht of 1713, made in acceding to the 1956 Convention on the Contract for the International Carriage of Goods by Road (*ibid.*, No. 50 (1974), p. 18), which Spain expressly stated not to constitute a 'reservation' to the Convention but to which nevertheless the United Kingdom lodged a formal note of non-acceptance (*ibid.*, No. 60 (1974), p. 20).

<sup>4</sup> The Peruvian delegate had referred to a separate type of inadmissible reservation by which States made their acceptance of a treaty subject to their own municipal law. Since this type of



In practice, Parties do not always specify the grounds for their objection to a reservation, for no rule of law requires them so to do. However, there are examples of objections based on this ground of 'incompatibility'. For example, in refusing to accept the Spanish reservations to Articles I, II and III of the 1953 Convention on the Political Rights of Women,<sup>1</sup> the Czechoslovak Government stated specifically that:

The Government of the Czechoslovak Socialist Republic considers that the above-mentioned reservations of the Government of Spain are incompatible with the objectives of the Convention.<sup>2</sup>

In some cases the grounds are less clear. In acceding to the 1946 Convention on the Privileges and Immunities of the United Nations, the German Democratic Republic formulated a reservation to Section 30<sup>3</sup> (providing for reference of disputes to the International Court of Justice). The Convention contained no reservations clause. The United Kingdom objected in these terms:

The United Kingdom Government wish to put on record that they are unable to accept that reservation, because, in their view, it is not of a kind which intending parties to the Convention have a right to make.<sup>4</sup>

The objection clearly regarded the reservation as impermissible, and one can only presume this was on the ground of incompatibility with the object and purpose of the Convention. There is no indication of what consequences the United Kingdom attached to the objection.

### 3. THE EFFECT OF FORMULATING AN IMPERMISSIBLE RESERVATION

Assuming that the unilateral statement is a true reservation (and not a mere interpretative declaration), and assuming further that the reservation is impermissible, the question then arises of the effect of such a reservation. Is the reservation a nullity, to be set aside, leaving the State's act of ratification or accession as the effective, binding act of the State? Or does the inclusion of the impermissible reservation operate so as to invalidate and nullify the State's act of ratification or accession?

There is a patent contradiction in the expression of will by the State.<sup>5</sup> There reservation negates the consent to be bound, it can be assumed to be incompatible with the object and purpose: *Official Records*, loc. cit. (above, p. 68 n. 1), p. 109, 21st Meeting, 10 April 1968.

<sup>1</sup> *United Kingdom Treaty Series*, No. 101 (1967) (Cmnd. 3449); *United Nations Treaty Series*, vol. 193, p. 135. Article VII of this Treaty envisaged the possibility of reservations being submitted to any of the articles of the Treaty. The text of the Spanish reservation can be found in *United Kingdom Treaty Series*, No. 40 (1974) (Cmnd. 4759), p. 12.

<sup>2</sup> *United Kingdom Treaty Series*, No. 50 (1974) (Cmnd. 5877), p. 13.

<sup>3</sup> *Ibid.*, No. 60 (1974) (Cmnd. 6008), p. 17.

<sup>4</sup> *Ibid.*, No. 102 (1975) (Cmnd. 6174), p. 16.

<sup>5</sup> This would not be so when the reservation is formulated at the time of signing if the act of signature does not itself make the State a party. In those circumstances, when an objection to the permissibility of the reservation is made, the State has an opportunity to withdraw the reservation, or to refrain from ratifying, and there is no true conflict between the expressions of will by the State until the State purports to accept two inconsistent legal obligations. It will be noted that

is the expression of a will to be bound by the treaty, as evidenced in the act of ratification or accession or even signature (if that is intended to be binding); and then there is the expression of a will to impose a condition, in the form of a reservation, which is in contradiction with the intention to be bound by the treaty precisely because the reservation is not permissible under the treaty. Which expression of will is to prevail?

In principle, the will which ought to prevail is the will to accept the treaty. For that is evidently the overriding intention, the primary intention of the State, and this view is strengthened by the consideration that the State will presumably not have perceived that its reservation is impermissible,<sup>1</sup> whereas its perception of the effect of its act of ratification or accession is clear and unequivocal.

To support this conclusion by direct authority, or even by analogy, is not an easy matter.<sup>2</sup> No direct authority can be found for the proposition that an impermissible reservation is a nullity and severable from the principal act of ratification or accession. The related, but not strictly analogous,<sup>3</sup> problem of reservations to the Optional Clause is as yet unresolved. However, Judge Lauterpacht's view was that:

If that reservation is an essential condition of the Acceptance in the sense that without it the declaring State would have been wholly unwilling to undertake the

Article 23 (2) of the Vienna Convention on Treaties requires a reservation formulated on signature to be confirmed when subsequently the State consents to be bound by the treaty, and the reservation is considered to have been made on the date of confirmation.

<sup>1</sup> This therefore construes the problem as a 'mistake of law' and, in principle, a mistake of law as opposed to a mistake of fact will not operate so as to invalidate the treaty, however fundamental the mistake of law is: see the Vienna Convention on the Law of Treaties, Article 48 (A/CONF. 39/27).

<sup>2</sup> The paucity of discussion on this point in the Vienna Conference is perhaps surprising. The Irish delegate thought a State could not become a Party until its impermissible reservation was withdrawn (*Official Records*, p. 122, 23rd Meeting, 11 April 1968), and so did India (*ibid.*, p. 128). The Japanese amendment (A/CONF. 39/C.1/L.133/Rev.1) and the Australian amendment (L.166), in proposing a 'collegiate' system for determining incompatibility, envisaged that the effect of a rejection of a reservation would be to debar the reserving State from becoming a party to the treaty at all. There is, however, some uncertainty about whether these States would have taken the same view of the effect of an impermissible reservation under a non-collegiate system. And, in any event, these amendments were rejected (although not because of disagreement on this particular point).

The analogies from the law of contract in private law are not particularly helpful, because the type of treaty with which we are concerned is not analogous to a contract but is more akin to a quasi-legislative act. But this should strengthen the importance of public policy in determining the issue, and with multilateral treaties the public policy rationale of the whole system of reservations is to increase the opportunities for States to participate in such treaties. Arguably, therefore, this suggests that whenever possible the impermissible reservation, though itself a nullity, should not nullify the entire acceptance of the treaty. For an illustration of the relevance of public policy on severance clauses in private law contracts which are illegal or void, see *Chitty on Contracts*, 23rd edn., vol. 1, paras. 953-70.

<sup>3</sup> The analogy is not strict because the link between States accepting Article 36 (2) of the Statute of the I.C.J. is not a treaty link. However, the analogy is certainly close and in the *Interhandel* case, Judgment of 21 March 1959, *I.C.J. Reports*, 1959, Judge Lauterpacht thought the invalid reservation of the U.S.A. to be both invalid and non-severable, thereby invalidating the entire acceptance of the Optional Clause by the U.S.A. (see pp. 101, 116-19); whereas Judges Klaestad (pp. 76-8) and Armand-Ugon (pp. 93-4) thought the invalid reservation could be severed, leaving the acceptance of the Optional Clause valid and effective.

principal obligation, then it is not open to the Court to disregard that reservation and at the same time to hold the accepting State bound by the declaration.<sup>1</sup>

It will be recalled that Judge Lauterpacht took this view having carefully examined the practice of the United States, and having come to the conclusion that the insistence on an 'automatic' reservations clause was a positive, intentional and consistent part of United States policy. The case we postulate is scarcely of that kind but more a case when it must be assumed that the State failed to perceive that its particular reservation was impermissible. Moreover, Judge Lauterpacht also stated that '... there is no element of illegality involved in a declaration of Acceptance which is inconsistent with the Statute of the Court',<sup>2</sup> whereas we postulate a reservation prohibited by the treaty, or not permissible under the treaty, or contrary to the object and purpose of the treaty, and thus arguably illegal.

In short, it is important to understand that not all impermissible reservations will be fundamentally inconsistent with the object and purpose of the treaty. Earlier, we have instanced the French reservations to the 1958 Geneva Convention on the Continental Shelf which, though arguably impermissible, were not in fundamental contradiction with the object and purpose of the treaty. Thus, it is possible to assimilate fundamentally incompatible reservations with Lauterpacht's category of reservations which nullify the whole acceptance of the principal obligation (be it the Optional Clause or a treaty); and yet keep distinct those reservations which, though they are not permissible, do not raise the issue of fundamental incompatibility and, therefore, may be severed.

Perhaps the safest conclusion, therefore, is that, given the inconsistency of the two expressions of will, it is essentially a question of construction as to what the State really intended. If it can be objectively, and preferably judicially, determined that the State's paramount intention was to accept the treaty, as evidenced by the ratification or accession, then an impermissible reservation which is not fundamentally opposed to the object and purpose of the treaty can be struck out and disregarded as a nullity. Conversely, if the State's acceptance of the treaty is clearly dependent upon an impermissible condition of which the terms are such that the two are not severable and the reservation is in fundamental contradiction with the object and purpose of the treaty, then the effect of that impermissible and invalid reservation is to invalidate the act of ratification or accession, nullifying the State's participation in the treaty.

The Advisory Opinion of the International Court in the *Reservations* case affords some support for this conclusion: its reply to the first question posed was in the following terms:

That a State which has made and maintained a reservation which has been objected to by one or more of the parties to the Convention but not by others, can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention; otherwise, that State cannot be regarded as being a party to the Convention.<sup>3</sup>

<sup>1</sup> Ibid., p. 117.

<sup>2</sup> Ibid., p. 118.

<sup>3</sup> *I.C.J. Reports*, 1951, p. 29.



Further support for this view can be found in State practice. For example, the Convention on the Territorial Sea and Contiguous Zone of 1958 did not contain any reservations clause, in contrast to the Convention on the Continental Shelf of 1958; yet the U.S.S.R. and various other States formulated reservations to it. A limited number of Parties have objected to these reservations, seemingly on grounds of impermissibility.<sup>1</sup> Whilst the United States did not itself specify that it objected on grounds of impermissibility, in a communication to the Secretary-General dated 27 October 1967, it stated:

The Government of the United States wishes to state that it has considered and will continue to consider all the Geneva Law of the Sea Conventions of 1958 as being in force between it and all other States that have ratified or acceded thereto, including States that have ratified or acceded with reservations unacceptable to the United States. With respect to States which ratified or acceded with reservations unacceptable to the United States, the Conventions are considered by the United States to be in force between it and each of those States except that provisions to which such reservations are addressed shall apply only to the extent that they are not affected by those reservations.<sup>2</sup>

Thus, the United States did not regard the impermissible reservation as operating to preclude the reserving States from becoming Parties.<sup>3</sup> However, the communication from the United States then discloses a further question: assuming the 'reserving' States to be Parties, what precisely is the treaty between the United States and such States? In short, what is the effect of the impermissible reservation on the treaty text?

The last phrase of the United States' communication is not without difficulty on this point for it is not absolutely clear from the words used whether the United States regards the impermissible reservations as a complete nullity or simply as unopposable to the United States. The former view would regard the provisions of the Convention as unaffected by the reservations;<sup>4</sup> the latter view would operate so as to exclude those parts of the provisions affected by the reservations from the treaty as between the United States and the reserving States. This latter view is, of course, the correct view for *permissible* reservations, and Article 21 (3) of the Vienna Convention so provides; but to apply the same view to *impermissible* reservations is scarcely logical.

The United Kingdom's reactions to these same reservations to the Convention

<sup>1</sup> The objection of Israel referred to 'all reservations . . . incompatible with the purposes and objects of these Conventions'; Japan stated that 'it does not consider acceptable any unilateral statement in whatever form . . . intended to exclude or modify for such State legal effects of the provisions of the Convention' (ST/LEG/SER. D/9, p. 473).

<sup>2</sup> *Ibid.*, p. 474.

<sup>3</sup> For other State practice to the same effect see the reactions to reservations to Article 37 (2) of the Vienna Convention on Diplomatic Relations of 1961 by France: *Multilateral Treaties in respect of which the Secretary-General performs Depositary Functions* (ST/LEG/SER. D/9), p. 58.

<sup>4</sup> As, for example, with the United States' reaction to the Italian declaration on ratifying the 1968 Non-Proliferation Treaty (*United Kingdom Treaty Series*, No. 125 (1975) (Cmnd. 6268), p. 4) which the U.S.A. rejected, then stating: 'The Government of the United States considers that the Government of Italy is fully a party to the Treaty . . . bound by all the terms of the Treaty without exception' (*ibid.*, No. 161 (1975) (Cmnd. 6369), p. 10).

on the Territorial Sea and the Contiguous Zone are not any clearer on this point. In a communication to the Secretary-General dated 6 November 1959,<sup>1</sup> and having stated that there is no right to make reservations to either that Convention or the High Seas Convention, Her Majesty's Government expressed the view that:

Even in the absence of a right to *make* reservations to a Convention, it is of course always possible for a party or intending party to propose a reservation, but in that case the *reservation* only has validity if it is accepted by the other parties, or at any rate is not objected to. If any party objects to the *reservation*, the latter can have no validity, at any rate against the party making the objection.

Even this text is not free from difficulty, for although it is clear that the United Kingdom does not regard the impermissible reservation as precluding the reserving State from becoming a Party, as with the United States' objection it remains unclear whether the reservation is to be regarded as a complete nullity or whether it operates in the manner prescribed for permissible reservations under Article 21 (3).<sup>2</sup>

The practice of the United Kingdom in relation to the Vienna Convention on Diplomatic Relations of 1961 suggests that the latter is the view taken by the United Kingdom. The United Arab Republic and other States made reservations to Article 37 (2) which the United Kingdom 'did not regard as valid',<sup>3</sup> but the United Kingdom explained in response to an inquiry from one of these States that it would continue to regard itself as bound *vis-à-vis* the reserving States by the provisions of the Convention *other than* Article 37 (2).<sup>4</sup> This suggests that the United Kingdom regards the reservations not as a nullity but merely as unopposable in the sense of Article 21 (3) of the Vienna Convention on the Law of Treaties, for the effect is to delete Article 37 (2) rather than insist upon its application in its original terms.

In contrast, if one looks at the terms of the Danish objections to the reservations to the 1958 Convention on the Territorial Sea and Contiguous Zone, these conclude with the phrase 'the above-mentioned objections shall not affect the coming into force of the Convention, according to Article 29, as between Denmark and the Contracting Parties concerned'.<sup>5</sup> Although still not entirely clear, it is arguable that Denmark took the view that the reservations

<sup>1</sup> *Multilateral Treaties in respect of which the S.G. performs Depositary Functions*, loc. cit. (above, p. 68 n. 2), p. 474 (not the full text). The paragraph cited was in fact substituted as a correction to the sixth paragraph of the original letter by a subsequent letter dated 10 August 1960. The earlier draft of the sixth paragraph had taken the view that the effect of the objection was to preclude the reserving State from becoming a party to the Convention.

<sup>2</sup> The same is true of the United Kingdom's objection to the reservations to the four 1949 Geneva Red Cross Conventions, none of which contained a reservations clause. The United Kingdom declaration of 23 September 1957 described these reservations as invalid and 'will therefore regard any application of these reservations as constituting a breach of the Convention . . .'; but this still does not clarify whether the reservation is a nullity or merely unopposable to the United Kingdom: texts in *United Kingdom Treaty Series*, No. 39 (1958) (Cmd. 550), pp. 324-61; *United Nations Treaty Series*, vol. 278, p. 325.

<sup>3</sup> *Multilateral Treaties*, etc. (ST/LEG/SER. D/9), p. 60.

<sup>4</sup> The United States took the same view: *Multilateral Treaties* etc. (ST/LEG/SER. D/9), p. 60.

<sup>5</sup> *Ibid.*, p. 473.



were impermissible, but not contrary to the whole object and purpose of the treaty and therefore were severable, as a nullity, leaving the treaty intact in its original terms so far as Denmark was concerned.

The State practice in relation to later treaties shows some improvement in clarity. For example, in relation to the Vienna Convention on the Law of Treaties itself, States like Syria and Tunisia entered reservations to the provisions on disputes settlement (Article 66 (a) and the Annex), provisions which were regarded by the Parties as fundamental to the treaty. The United Kingdom objected to such reservations and specifically stated that the United Kingdom 'does not accept the entry into force of the Convention as between the United Kingdom and Syria (or Tunisia)'.<sup>1</sup> Presumably the United Kingdom took the view that the reservation was impermissible. It might also be presumed that the United Kingdom took the view that the reservation was incompatible with the object and purpose of the Treaty,<sup>2</sup> was not severable, and therefore precluded Syria and Tunisia from becoming Parties *vis-à-vis* the United Kingdom. Since the reasoning of the United Kingdom is a matter of surmise, this can only be a presumption, but at least it is a presumption consistent with the analysis of the legal position which it is the purpose of this article to develop.

This is clearly an important issue which still needs clarification. As we shall see, the difference between an impermissible reservation and a permissible reservation to which a Party objects is a very real difference. Not only is the test for non-acceptance quite different, but the effect of the objection will vary according to whether the reservation is regarded as impermissible or, in the alternative, permissible but objectionable and therefore 'unopposable' to the objecting State.

It is, however, clear that the effect of an impermissible reservation should *not* depend upon the reactions of the other Parties to the reservation in the same way as with a permissible reservation. For the issue of permissibility is determined by the treaty. It is a question whether the reservation is permitted by the treaty, and thus, though the Parties may have to form a view on that (or refer the question to independent adjudication), the test of permissibility is the treaty itself. This is therefore quite distinct from the issue of 'opposability', which arises only in relation to a permissible reservation and which involves inquiring into the reactions of the Parties to that reservation and the effects of such reactions: this will be dealt with below.

<sup>1</sup> *Multilateral Treaties*, etc. (ST/LEG/SER. D/9), p. 503. In relation to the same reservations Sweden objected to the reservations on the ground that they affected provisions which 'are an important part of the Convention' and which 'cannot be separated from the substantive rules with which they are connected'. This therefore looks like an 'incompatible with object and purpose and non-severable' analysis. Yet, illogically in this writer's view, Sweden did not object to treaty relations with Syria and Tunisia but simply excluded from those relations the parts of the treaty affected: *ibid.* The U.S.A. reacted similarly to Sweden, although stating expressly that the Syrian reservation was incompatible with the object and purpose of the treaty: *ibid.*, pp. 503-4.

<sup>2</sup> This is certainly the view of the U.K. delegate, Sir Ian Sinclair, expressed in his book *The Vienna Convention on the Law of Treaties* (1973), p. 48. Yet in stating that the United Kingdom exercised its right to object *under Article 20* he implies that the reservation was permissible.



#### 4. THE DETERMINATION OF WHICH RESERVATIONS ARE PERMISSIBLE AND WHICH ARE IMPERMISSIBLE

This determination is initially a matter for each Party. As indicated above, the ultimate test is the treaty itself which will govern the application of the various criteria enumerated in section 2 above. A Party is not entitled to regard a reservation as impermissible simply on the basis that it chooses not to accept it as a matter of policy. To do so would be to confuse the Party's undoubted right to object to the reservation and thus render it not 'opposable' to it with the quite separate and antecedent question of whether the reservation is permissible at all. The question of permissibility, since it is governed by the treaty itself,<sup>1</sup> is eminently a legal question and entirely suitable for judicial determination and, so far as the treaty itself or some other general treaty requiring legal settlement of disputes requires the Parties to submit this type of legal question to adjudication, this would be the appropriate means of resolving the question. In the absence of provisions of that kind, there is at present no alternative to the system in which each Party decides for itself whether another Party's reservations are permissible. The result could well be inelegant: that is to say, some may regard the reservation as impermissible, and some may not.

Indeed, there are examples of precisely this situation: as we have seen,<sup>2</sup> some Parties to the 1958 Convention on the Territorial Sea and Contiguous Zone regarded reservations as impermissible, yet other Parties made no objection to those reservations. In relation to the Vienna Convention on Diplomatic Relations of 1961, the Federal Republic of Germany has expressly stated that it regards the reservation by Bahrein to Article 27 (3) as incompatible with the object and purpose of the Convention;<sup>3</sup> yet other Parties have raised no objection.

The Vienna Conference was well aware of the disadvantages of a system by which Parties decided individually on the permissibility of a reservation. At the twenty-first meeting of the Committee of the Whole on 10 April 1968 Sir Ian Sinclair stated:

There was an obvious need for some kind of machinery to ensure that the test [the compatibility test] was applied objectively, either by some outside body or through the establishment of a collegiate system for dealing with reservations which a large group of interested States considered to be incompatible with the object and purpose of the treaty.<sup>4</sup>

However, although several delegations<sup>5</sup> supported this idea of a collective,

<sup>1</sup> If there is no reservations clause the presumption must be that reservations are permissible provided that they are not contrary to the object and purpose of the treaty.

<sup>2</sup> *Ante*, p. 78.

<sup>3</sup> *United Kingdom Treaty Series*, No. 102 (1975) (Cmnd. 6174), p. 7: communication by the Federal Republic dated 4 February 1975. For the Bahrein reservation see *ibid.*, No. 93 (1971) (Cmnd. 4911), p. 6.

<sup>4</sup> *Official Records*, loc. cit. (above, p. 68 n. 1), p. 114.

<sup>5</sup> For example, Sweden (p. 117), Australia (p. 119), Ghana (p. 120), Italy (p. 120, describing

or independent, judgment as opposed to a purely individual judgment, the Conference decided against it,<sup>1</sup> doubtless very much affected by the view expressed by the Expert Consultant and Rapporteur to the International Law Commission, Sir Humphrey Waldock, at the twenty-fourth meeting:

Suggestions had been made . . . for the adoption of some system of collegiate objection on the ground in Article 16, sub-paragraph (c) [incompatible with the object and purpose of the treaty], and having effect *erga omnes*. His view was that proposals of that kind, however attractive they seemed, would tilt the balance towards inflexibility and might make general agreement on reservations more difficult. In any case, such a system might prove somewhat theoretical, since States did not readily object to reservations.

It was true that, although the International Law Commission had intended to state an objective criterion, the method of application proposed in the draft articles was subjective, in that it depended on the judgment of States. But that situation was characteristic of many spheres of international law in the absence of a judicial decision, which in any case would bind only the State concerned and that only with respect to the case decided.<sup>2</sup>

The last sentence of Sir Humphrey's statement is a telling one, and in the event the majority of the Conference voted against a collegiate system. Yet neither Sir Humphrey nor the Conference specifically adverted to the difficult question of whether, given a unilateral determination of incompatibility and therefore impermissibility, it follows that the reserving State is not a Party or, alternatively, that it is a Party and that the reservation alone is regarded as a nullity.

## 5. THE DIFFERENT REACTIONS TO A RESERVATION WHICH ANOTHER PARTY MAY MAKE AND THE EFFECT OF SUCH REACTIONS

### (i) *Impermissible reservations*

It must be accepted that, as shown in the previous section, Parties may take a different view of the permissibility of a certain reservation. The question which we now pose, however, is what reactions are open to a Party which does decide that the reservation is impermissible? We are here concerned with the permissibility of the reaction, consequent upon the reacting State's decision that the reservation is itself impermissible.

If the reservation is impermissible because it is expressly prohibited, it would appear difficult to justify an acceptance of such a reservation by another Party. For the effect would be to defeat the clear purpose of the agreed reservations article. The inconsistency is plain and the conduct of the 'accepting' State,

it as 'the most serious problem raised by the articles'), Ireland (p. 123), New Zealand (p. 127), Ceylon (p. 127), India (p. 128), Zambia (p. 129).

<sup>1</sup> The Japanese delegation had proposed an amendment embodying the 'collegiate' system (A/CONF. 39/C.1/L.133/Rev.1), but this was rejected by 48 votes to 14 with 25 abstentions at the twenty-fifth meeting.

<sup>2</sup> *Official Records*, loc. cit. (above, p. 68 n. 1), p. 126.

being contrary to the agreed reservations article, is essentially a breach of the treaty.

Where the reservation is only impliedly prohibited, there may be room for argument over whether a particular reservation is indeed prohibited, but if the 'accepting' State does recognize that the reservation is prohibited, then the same principle should apply and an 'acceptance' is equally a breach of the treaty.<sup>1</sup> This was certainly the view of the Expert Consultant, Sir Humphrey Waldock. Replying to a question from the Canadian delegate, he stated at the twenty-fifth meeting:

... a contracting State could not purport, under Article 17, to accept a reservation prohibited under Article 16, paragraph (a) or paragraph (b), because by prohibiting the reservation, the contracting States would expressly have excluded such acceptance.<sup>2</sup>

It will be recalled that paragraphs (a) and (b) covered both expressly and impliedly prohibited reservations. The impossibility of accepting a reservation which is incompatible with the purpose and object of the treaty, that is the category covered by paragraph (c), is an *a fortiori* case. The contradiction in the conduct of a Party which accepts a treaty and then 'accepts' a reservation which it acknowledges to be contrary to the object and purpose of that same treaty is self-evident. Thus, the conclusion ought to be that impermissible reservations cannot be accepted.

It may be thought that this conclusion is contrary to what the International Court stated in the *Reservations* case in reply to Question II:

(a) that if a party to the Convention objects to a reservation which it considers to be incompatible with the object and purpose of the Convention, it can in fact consider that the reserving State is not a party to the Convention. . . .<sup>3</sup>

The phrase 'it can in fact consider . . .' has been taken to imply that the objecting State conversely can also consider that the reserving State is a Party.<sup>4</sup> But, whilst conceding that the Court's language is not very happy, it must be noted that the Court did not state that this was a possible attitude and the inference that a Party can accept such a reservation is not necessary or logical; whether a Party can, having necessarily objected to such a reservation, nevertheless consider the reserving State a Party is a matter which is distinct, and this has been discussed in section 3 above.

Returning to the simple proposition that an impermissible reservation cannot be accepted, the question then arises, what is the treaty relationship between the 'reserving' State and the other Parties, if any? As indicated earlier,<sup>5</sup> this

<sup>1</sup> This view had been expressed by Denmark at an earlier stage in the International Law Commission's Draft: see *Analytical Compilation of Comments and Observations made in 1966 and 1967, with respect to the Final Draft Articles on the Law of Treaties* (A/CONF.39/5), vol. 1, p. 156.

<sup>2</sup> *U.N. Conference on the Law of Treaties, Official Records*, loc. cit. (above, p. 68 n. 1), p. 133, 25th Meeting, 16 April 1968.

<sup>3</sup> *I.C.J. Reports*, 1951, p. 29.

<sup>4</sup> See the Explanatory Memorandum by the U.S.S.R. accompanying its amendment to Article 17 (A/CONF.39/L.3), submitted to the second session of the Vienna Conference: *Official Records*, etc., p. 265.

<sup>5</sup> Above, p. 81.



does not depend upon the reaction of the other Parties, and the better view is that when the impermissibility arises from the fundamental inconsistency of the reservation with the object and purpose of the treaty, the reservation and the whole acceptance of the treaty by the reserving State are nullities. Conversely, when the reservation is not of this kind, though impermissible on other grounds, the reservation alone is a nullity and if severable can be struck out. As to a purported 'acceptance' of an impermissible reservation, this, too, should be regarded as a nullity. There is, of course, a necessary *caveat*. The above analysis assumes that the will of the Parties, as expressed in the treaty, remains constant; and thus the question examined above is one of the reactions which are possible for the Parties consistent with that will. However, the Parties can always change that will. Treating the impermissible reservation as a request for a waiver which the treaty does not permit, the Parties might still alter their collective will and decide to grant the waiver. Ideally this should be done by an additional protocol, or by amending the reservations article to permit the reservation which was previously impermissible. If they accede to the request for a waiver by conduct in the form of accepting the reservation they are essentially modifying the treaty by subsequent conduct. This is certainly a possibility, but it should be seen (and is better openly expressed) as an agreed modification. It will scarcely clarify the law on reservations to embrace this possibility within the rules about reservations.

## (ii) *Permissible reservations*

The flexible system adopted by the Vienna Conference is clearly set out in Article 20(4):

In cases not falling under the preceding paragraphs and unless the treaty otherwise provides:

- (a) acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those States;
- (b) an objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving State unless a contrary intention is definitely expressed by the objecting State;
- (c) . . .

Before turning to the options available under this paragraph, we must first exclude the cases covered by the three preceding paragraphs (reservations expressly authorized and requiring no acceptance, reservations to the 'contractual' type of treaty requiring the consent of all Parties, and reservations to constituent instruments of international organizations). The situation of a reservation expressly authorized, and covered by Article 20 (1), needs some comment. Not only does such a reservation need no subsequent acceptance, unless the treaty so requires, but it *cannot* be the subject of an objection.<sup>1</sup> The Parties have already agreed that the reservation is permissible and, having

<sup>1</sup> This was the view of France, *United Nations Conference on the Law of Treaties, Official Records*, loc. cit. (above, p. 68 n. 1), p. 116, 22nd Meeting, 11 April 1968.

made its permissibility the object of an express agreement, the Parties have abandoned any right thereafter to object to such a reservation.

However, it is important to understand what is a reservation 'expressly authorized'. Merely to permit reservations to specific articles is not to make such reservations 'expressly authorized', for the Parties may have no means of knowing what the content of such reservations may be. Express authorization presupposes that the content of the reservation is known by the Parties in advance, so that they can be regarded as having already agreed to it. This point has been illustrated in section 2 above. These cases apart, however, the Parties have three options:

(a) *Acceptance of the reservation.* Whether acceptance is by express communication or is implied from failure to object after twelve months have expired from the date of notification of the reservation (or date of consent to the treaty, whichever is the later), the acceptance of a permissible reservation produces the effect set out in Article 21 (1), that is to say it:

- (a) modifies for the reserving State in its relations with the other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and
- (b) modifies those provisions to the same extent for that other party in its relations with the reserving State.

...

This means that, as between the two Parties, not only is the treaty in force but the reservation also takes full effect (although without prejudice to the position of any other Party to the treaty). The reservation of course operates reciprocally, so that the 'accepting' State can invoke the same reservation as against the 'reserving' State.<sup>1</sup> The only problem may be to determine 'the extent of the reservation', for it by no means follows that the entire article or provision is excluded; the exclusion may only affect a word or phrase. It is also relevant to point out that if it is not possible to apply this test of exclusion in the sense that it is impossible to identify the particular provision to be excluded, this is strong *prima facie* evidence that the reservation is not a true or permissible reservation to that article or provision of the treaty at all.

(b) *Objection to the reservation but without opposing the entry into force of the treaty.* As Article 20 (4) (b) makes clear, the objection to the entry into force of the treaty must be express; the presumption, in the absence of such an express intention, is that the treaty is in force notwithstanding the objection to the reservation.<sup>2</sup> The rationale for the continuing validity of the treaty,

<sup>1</sup> The World Health Organization, in commenting on the Final Draft Articles, had made the point that reciprocity was well established: A/CONF.39/5, vol. 1, p. 165. The I.L.C. agreed: see *Yearbook of the I.L.C.*, 1966, vol. 2, p. 209, Commentary to Article 19.

<sup>2</sup> The I.L.C. Final Draft Articles, Article 17 (4) (b) had adopted the opposite presumption, but this was much criticized during the Vienna Conference and various amendments were proposed (A/CONF.39/1/L.84, L.94 and L.115) and at the second session, on the basis of a proposal by the U.S.S.R. (A/CONF.39/L.3), the I.L.C.'s presumption was reversed. For doubts on the wisdom of this reversal see Sinclair, *The Vienna Convention on the Law of Treaties* (1973), p. 43. However, as adopted, the text of the Vienna Treaty carries the presumption that the treaty

despite the objection to the reservation, is, of course, that we are here concerned only with permissible reservations which, by definition, do not affect the object and purpose of the treaty.

The legal effect of a Party's taking this option is quite different from that in the case of the first option. For, in the words of Article 21 (3), the effect is that:

. . . the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation.

It is clear that there can be no question of giving the reservation full force and effect. The result is rather that 'the provisions to which the reservation relates do not apply . . .'. Hence, the part of the treaty text affected by the reservation drops out of the treaty in the relations between 'reserving' and 'objecting' States. The treaty can obviously subsist minus such a part because by definition, being a permissible reservation, it does not touch a part of the treaty which is essential to the whole object and purpose of the treaty.

The practical difficulty may be that of determining precisely which part of the treaty is affected by the reservation and must therefore be omitted from the agreement between the two Parties. It may be a whole article, or a sub-paragraph of an article, or merely a phrase or word within the sub-paragraph. There can be no rule to determine this, other than the rule that by normal methods of interpretation and construction one must determine which are the 'provisions', the words, to which the reservation relates.

A further question is that of the grounds upon which an objection to the reservation may be made. This question is believed to be identical with that posed in relation to the third option, objection to the reservation *and* to the entry into force of the treaty, so it may be postponed until the next section.

(c) *Objection to the reservation coupled with an express declaration of intention that the treaty shall not be in force between the 'reserving' and the 'objecting' States.* Such cases of an express objection to the treaty's entering into force may be expected to be rare,<sup>1</sup> but the principle of State sovereignty demands that a Party is not bound to accept a reservation which is, after all, a departure from the agreed text.

Some uncertainty has existed over the question of the grounds upon which an objection to both the reservation and the treaty may be made. The United Kingdom delegate to the Vienna Conference, Sir Ian Sinclair, had assumed that objections need not be confined to the single ground of the incompatibility of the reservation with the object and purpose of the treaty.<sup>2</sup> The Expert

is in force. The position prior to the Vienna Convention is controversial. Perhaps the better view is that no presumption existed either way and it was a matter to be decided from all the relevant circumstances as to whether the parties intended the treaty to be in force, notwithstanding the objection to the reservation.

<sup>1</sup> But for examples see above, p. 80.

<sup>2</sup> *United Nations Conference on the Law of Treaties, Official Records*, loc. cit. (above, p. 68 n. 1), p. 114, 21st Meeting, 10 April 1968.



Consultant, Sir Humphrey Waldock, confirmed the correctness of this assumption. At the twenty-fifth meeting he replied:

The second question was, when a reservation had not been expressly authorized, and at the same time was not one prohibited under Article 16, paragraph (c), could a contracting State lodge an objection other than that of incompatibility with the object and purpose of the treaty? The answer was surely Yes.<sup>1</sup>

This is obviously the correct answer, for a reservation which is incompatible with the object and purpose of the treaty is impermissible; hence, one could not have a system whereby, in relation to a *permissible* reservation, the only valid ground for objecting is that the reservation is incompatible with the object and purpose of the treaty. Indeed, if the reservation is permissible, an objecting State needs no legal ground for its objection since it is entitled to object purely on policy grounds. It is under no legal obligation to accept the reservation (unless the reservation is expressly authorized) or to accept the treaty relations with that reserving State. Why, therefore, should it be under an obligation to state the legal basis for its objection?

Again we see the difference between 'opposability' and 'permissibility', for a State objecting to the permissibility of a reservation ought to state why, in its view, the treaty does not permit the reservation. A tribunal might in due course disagree with this view. But no tribunal can ever say that a Party *must* accept a reservation not expressly authorized, for the Party is free to accept or object entirely on grounds of policy which are not subject to judicial review.

## 6. WITHDRAWAL OF RESERVATIONS AND OBJECTIONS

Article 22 of the Vienna Convention expressly provides for withdrawal of both reservations and objections to reservations. Withdrawal must be in writing according to Article 23 (4), so that abandonment of a reservation or an objection by conduct is not envisaged. The requirement of writing certainly makes it easier to specify the point in time at which the withdrawal takes effect, and that is the time of notification to the objecting or the reserving Party, as the case may be. No consent is needed on either side.

The effect of withdrawal of a reservation is obviously to restore the original text of the treaty. Although the Convention does not say so, the Commentary of the International Law Commission was clear on this point: 'the reserving State should always be free to bring its position into full conformity with the provisions of the treaty as adopted . . .'<sup>2</sup>

Somewhat strangely, the Convention does not deal specifically with the effect of the withdrawal of a reservation in relation to another Party which has objected not merely to the reservation but also to treaty relations. But it must be assumed that the withdrawal establishes the treaty relationship.<sup>3</sup> With the

<sup>1</sup> Ibid., p. 133, 25th Meeting, 16 April 1968.

<sup>2</sup> *Yearbook of the I.L.C.*, 1966, vol. 2, p. 209, Commentary to Article 20.

<sup>3</sup> This was the view, uncontested, of the Austrian delegate: *Official Records*, loc. cit. (above, p. 68 n. 1), p. 138, 25th Meeting, 16 April 1968.

withdrawal of an objection to a reservation, this becomes equivalent to acceptance of the reservation and correspondingly the reservation has full effect.

## 7. CONCLUSIONS

An examination of recent State practice on reservations suggests that there is considerable uncertainty over the operation of the rules now embodied in the Vienna Convention.

The primary source of uncertainty is the failure to perceive the difference between the issue of the 'permissibility' of a reservation and the issue of the 'opposability' of a reservation to a particular Party.

The issue of 'permissibility' is the preliminary issue. It must be resolved by reference to the treaty and is essentially an issue of treaty interpretation; it has nothing to do with the question of whether, as a matter of policy, other Parties find the reservation acceptable or not. The consequence of finding a reservation 'impermissible' may be either that the reservation alone is a nullity (which means that the reservation cannot be accepted by a Party holding it to be impermissible) or that the impermissible reservation nullifies the State's acceptance of the treaty as a whole.

The issue of 'opposability' is the secondary issue and pre-supposes that the reservation is permissible. Whether a Party chooses to accept the reservation, or object to the reservation, or object to both the reservation and the entry into force of the treaty as between the reserving and the objecting State, is a matter for a policy decision and, as such, not subject to the criteria governing permissibility and not subject to judicial review.

It therefore follows that State practice would be clearer, and more logical, if objections to reservations stated whether the objection was based on the view that the reservation was impermissible or not. This would enable the reserving State to argue the matter of permissibility, if this were the ground of objection, whereas it cannot argue with a policy objection. It should also be incumbent upon a State objecting on the ground of impermissibility to state whether, in its view, the effect is to nullify the reservation or to nullify the acceptance of the treaty by the reserving State. Without such a statement of the legal consequences which a Party attaches to its objection on the ground of impermissibility, it is impossible to determine whether there is a treaty relationship or not.

Where the objection is not on the ground of impermissibility the matter is simpler, since Articles 20 and 21 of the Vienna Convention effectively indicate what legal consequences flow from acceptance, objection, or objection to both the reservation and any treaty relationship.

If this analysis is correct, it seems possible to formulate the following propositions which might provide useful guidance to States:

1. The test of a true reservation is whether it seeks to exclude or modify the legal effect of the provisions of the treaty to which the reservation is attached, and by this test a reservation must be distinguished from declarations or other

interpretative statements however named. The latter, whilst not reservations, need not be accepted and raise an issue of treaty interpretation.

2. The permissibility of reservations under contemporary law is governed by the rules set out in Article 19 of the Vienna Convention; in essence, these rules assume the general permissibility of reservations to the non-restricted multilateral treaty except where reservations are expressly or impliedly prohibited or are incompatible with the object and purpose of the treaty. The criterion of 'compatibility' does not apply to reservations which are prohibited, expressly or impliedly, or to a reservation which is expressly permitted.

3. A reservation which is expressly permitted and which requires no subsequent acceptance is one the legal effect of which is capable of being deduced from the treaty itself. Thus, a reservations clause permitting reservations to an article in general terms does not mean that all reservations to that article are *ipso facto* permissible and require no subsequent acceptance, although a reservation excluding the article *in toto* might be of this nature.

4. Therefore, in relation to reservations to an article to which reservations are allowed, the permissibility of any particular reservation will depend upon its fulfilling certain criteria, namely:

- (i) that it is a true reservation;
- (ii) that it is a reservation to that article and does not seek to modify the effect of some other article to which reservations are not allowed;
- (iii) that it does not seek to modify rules of law which derive from some other treaty or from customary international law;
- (iv) that it is not incompatible with the object and purpose of the treaty.

5. When a reservation is 'impermissible' according to the rules set out in conclusions 2, 3 and 4 above, the inconsistency in the reserving State's expression of a will to be bound by the treaty and the formulation of an impermissible reservation must be resolved as a matter of construction of what the State really intended. It is suggested that the following is the proper test:

- (i) a reservation not incompatible with the object and purpose of the treaty may be severed and should be disregarded as a nullity;
- (ii) a reservation incompatible with the object and purpose of the treaty and not severable invalidates the State's acceptance of the treaty.

6. The question of 'permissibility' is always a question to be resolved as a matter of construction of the treaty and does *not* depend on the reactions of the Parties. Therefore, though each Party may have to determine whether it regards a reservation as permissible, in the absence of any 'collegiate' system it must do so on the basis of whether the treaty permits such a reservation. The issue of 'permissibility' is thus entirely separate from the issue of 'opposability', that is to say whether a Party accepts or does not accept a reservation which is permissible.

7. Parties may not accept an impermissible reservation.

8. As to permissible reservations, with non-restricted multilateral treaties, a reservation which is expressly authorized in the sense of conclusion 3 above



requires no acceptance and takes effect with the reserving State's acceptance of the treaty. That apart, permissible reservations may meet with the following three reactions from other Parties:

- (i) acceptance of the reservation: the effect is that the treaty is in force and the reservation takes full effect between the reserving and accepting States, on a reciprocal basis;
- (ii) objection to the reservation: the effect is that the treaty is in force, but *minus* the provision affected by the reservation *to the extent of the reservation*. The reservation is not 'opposable' to the objecting State;
- (iii) objection to the reservation and an express objection to the treaty's entering into force: the effect is that the reserving and objecting States are not in any treaty relationship. Neither the treaty nor the reservation is 'opposable' to the objecting State.

9. The objecting State, exercising either of the last two options set out in conclusion 8 above, is free to object on any ground: that is to say, its objection is not confined to the ground of 'incompatibility' with the object and purpose of the treaty.

10. Both reservations and objections may be withdrawn in writing, taking effect on communication to the objecting or reserving State, as the case may be. The effect of withdrawal is to restore the original treaty text in the case of the withdrawal of a reservation. In the case of the withdrawal of an objection, this is equivalent to an acceptance of the reservation.

#### ADDENDUM

The Award of the *ad hoc* Court of Arbitration on the delimitation of the Continental Shelf between France and the United Kingdom, given on 30 June 1977,<sup>1</sup> has involved consideration of the French reservations to Article 6 of the 1958 Geneva Convention on the Continental Shelf, the reservations considered at pp. 72 to 74 of the article.

The majority of the Court<sup>2</sup> held that the first two reservations were valid reservations to Article 6, rejecting the United Kingdom argument that these reservations were in reality reservations to Articles 3 and 4 of the Territorial Sea Convention (or the corresponding rules of customary law regarding base-lines) and to Article 1 of the Continental Shelf Convention, to which reservations were not permitted. The construction adopted by the Court was 'in accordance with the natural meaning' of the terms used, and this construction confined the reservations to the context of delimitations of shelf boundaries under Article 6.

The third reservation, which the United Kingdom had argued was a mere interpretative declaration to the effect that 'la baie de Granville' qualified as

<sup>1</sup> The text of the Award has yet to be published.

<sup>2</sup> Mr. Erik Castrén (President), M. André Gros, Mr. Endre Ustor, Sir Humphrey Waldoock. It should be emphasized that Mr. Briggs, the fifth member, agreed with the boundary drawn by the Court.

'special circumstances' within the meaning of Article 6, was also regarded by the majority as a valid reservation because it appeared 'to constitute a specific condition imposed by the French Republic on its acceptance of the delimitation régime provided for in Article 6'.<sup>1</sup> The majority saw this as modifying the legal effect of Article 6 and therefore a true reservation as defined by Article 2 (1) (d) of the Vienna Convention on the Law of Treaties.

Mr. Herbert Briggs, in a separate declaration, differed from his colleagues. Basing himself on the paragraph which preceded and governed all three reservations<sup>2</sup> and a French Note to the United Kingdom of 7 August 1964, and fortified by statements in the French pleadings, he regarded the purpose of all three reservations to be that of protecting France against *unilateral* delimitations based on the equidistance principle. Since the delimitation in question was to be determined by the Court of Arbitration, he held the 'reservations' to have no application to the present case. Moreover, he found the first two reservations lacked relevance because there were no baselines established after 1958 affecting the boundary, and because the *compromis* itself envisaged a boundary out to the 1,000-metre isobath (and therefore beyond 200 metres). He did not regard the third reservation as a true reservation at all.

More interesting for the purposes of this article, Mr. Briggs went on to say that he would in any event have held the first and second reservations as invalid because, though framed as reservations to Article 6, they in fact attempted to modify rights dependent on Articles 1 and 2, to which reservations were not permitted (i.e., he upheld the United Kingdom argument).

As to the effect of valid reservations to which the other party has objected,<sup>3</sup> the majority held that 'the effect of the United Kingdom's rejection of the reservations is thus limited to the reservations themselves'.<sup>4</sup> The reservations were 'non-opposable' to the United Kingdom, so that the result was 'to render the Article inapplicable as between the two countries to the extent, but only to the extent, of the reservations'.<sup>5</sup> Mr. Briggs, having taken the contrary view and having regarded all three reservations as invalid, came to the conclusion that Article 6 applied, unaffected by the reservations.

It may be useful to suggest what modifications, if any, this Arbitral Award

<sup>1</sup> Judgment, para. 55. The question may well be asked whether any State would not regard its interpretative declaration as a condition which it assumes to be accepted by any other State to which it is bound by the treaty; and, if so, how can there be an interpretative declaration as distinct from a reservation?

<sup>2</sup> The text in French was 'Le Gouvernement de la République française n'acceptera pas que lui soit opposée, sans un accord exprès, une délimitation entre des plateaux continentaux appliquant le principe d'équidistance'. The majority declined to share Mr. Briggs' view that the purpose of the reservations was to guard only against a *unilaterally* imposed boundary, for this would mean that before an arbitration tribunal such reservations could not be invoked, and the majority saw such a view as involving a 'serious impediment to recourse to arbitration and judicial settlement' (para. 64).

<sup>3</sup> On this the French argument was that the resulting disagreement excluded the treaty as the operative law between the Parties, or at the very least the whole of Article 6: the United Kingdom argument was that, the reservations being invalid, Article 6 was unaffected; or, if the reservations were valid, Article 6 was only modified *to the extent of the reservations*.

<sup>4</sup> Judgment, para. 59.

<sup>5</sup> Ibid., para. 61.

suggests to be desirable to the propositions made at the conclusion of this article. The first proposition suggests the basis for distinguishing between true reservations and an interpretative declaration. The majority do not deny this distinction, but their treatment of the third French reservation on 'special circumstances' as a condition, and a true reservation, suggests that the distinction may be very difficult to maintain. The fourth proposition is not vitiated by the majority judgment. The difference between the majority and Mr. Briggs is simply over whether the reservations did or did not, as a matter of construction, affect provisions of the treaty other than Article 6.

Proposition 5 (i) appears to be consistent with the views of Mr. Briggs, for he would disregard the invalid reservations, reservations which he did not characterize as incompatible with the object and purpose of the treaty. The sixth proposition is supported by the majority in so far as they distinguish permissibility (or validity) from 'opposability'. Proposition 8 (ii) is very much the proposition made by the majority. In conclusion, the Award seems to be consistent with the propositions in the article, except that the majority judgment has made the first proposition more difficult to apply in practice.



# THE CRITERIA FOR STATEHOOD IN INTERNATIONAL LAW\*

By JAMES CRAWFORD<sup>1</sup>

## I. INTRODUCTORY

IT seems clear that the notion of statehood occupies a central place in the structure of international law and relations. Disputes over the international position of a given entity, or the legality of a particular use of force, or even over asserted violations of human rights standards, very frequently reduce themselves to disputes as to the statehood or otherwise of the entity in question. The so-called 'divided States' since 1945 provide obvious examples;<sup>2</sup> as do the various disputes over southern Africa (Rhodesia, Namibia, and now the Transkei),<sup>3</sup> and the Middle East.<sup>4</sup> The centrality of the notion of statehood manifests itself in other ways. Full participation in the major international organizations is usually either made expressly dependent on,<sup>5</sup> or in practice requires,<sup>6</sup> the classification of the claimant as a State; so too do various forms of restricted participation.<sup>7</sup> It is almost a corollary that the three or four separate territorial entities whose statehood is generally denied<sup>8</sup> only participate in international relations in a very restricted way.<sup>9</sup> The continuing pressure for decolonization

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<sup>2</sup> See generally Caty, *Le statut juridique des états divisés* (1969); Martinez-Agullo, *Journal de droit international*, 91 (1964), pp. 265-84; J. Verhoeven, *La reconnaissance internationale dans la pratique contemporaine: les relations publiques internationales* (1975) (hereafter cited as Verhoeven, *Reconnaissance*), pp. 36-52.

<sup>3</sup> Rhodesia and the Transkei are discussed *infra*, pp. 162-4, 176-80. On Namibia see especially Dugard, *The South West Africa/Namibia Dispute* (1973); Slonim, *South West Africa and the United Nations: An International Mandate in Dispute* (1973); Herman, *Canadian Yearbook of International Law*, 13 (1975), pp. 306-22, and works there cited.

<sup>4</sup> Even in the recent literature on the Arab-Israel conflict the events of 1947-9 leading to the creation of Israel bulk large: see, e.g., Cattani, *Palestine and International Law. The Legal Aspects of the Arab-Israel Conflict* (2nd edn., 1976), pp. 63-130; Feinberg, *On an Arab Jurist's Approach to Zionism and the State of Israel* (1971); Elaraby, *Law and Contemporary Problems*, 33 (1968), pp. 97-108.

<sup>5</sup> e.g. Charter of the United Nations, Art. 4; *Conditions for Admission of a State to Membership in the United Nations, I.C.J. Reports*, 1948, p. 57 at p. 62; Higgins, *The Development of International Law through the Political Organs of the United Nations* (1963) (hereafter cited as Higgins, *Development*), pp. 17-42.

<sup>6</sup> e.g. Covenant of the League of Nations, Art. 1 (2) ('fully self-governing State, Dominion or Colony'). In practice only States were admitted to League Membership under Art. 1 (2). See Schwarzenberger, *The League of Nations and World Order* (1936); Feinberg, *Recueil des cours*, 80 (1952), pp. 297-393, for an examination of League admission practice.

<sup>7</sup> e.g. Charter of the United Nations, Arts. 32, 35 (2), as to which see Higgins, *Development*, pp. 50-2; Bailey, *The Procedure of the U.N. Security Council* (1975), pp. 145-52.

<sup>8</sup> Sc., Andorra, Rhodesia and Taiwan (Formosa).

<sup>9</sup> For the very limited participation of Rhodesia see Devine, *Acta Juridica*, 1974, pp. 112-24. The Republic of China on Taiwan of course maintains a considerable volume of bilateral relations even with States which do not recognize its claim to be the government of China: Chiu

since 1945 has also tended to focus on the single aim of 'independence', to the practical exclusion of other forms of self-government.<sup>1</sup> Other examples could be given.

Although it is sometimes suggested that the concept of statehood has no separate place in international law,<sup>2</sup> such a view is hard to square with the extensive reliance on the concept in international 'constitutional' documents such as the Charter, or in the practice of States. And yet—notwithstanding this practice—there has been surprisingly little detailed examination of the criteria for statehood in international law.<sup>3</sup> Such an examination would seem more necessary in that recent developments appear to demonstrate a change in what have traditionally been regarded as the necessary conditions for the creation or subsistence of States.<sup>4</sup> The relatively meagre literature on the criteria for statehood<sup>5</sup> compares strikingly with the extensive literature on recognition,<sup>6</sup> in which the recognition of States is usually treated together with more or less unrelated problems of recognition of governments, belligerency and insurgency. Indeed, discussion of the notion of statehood requires first an examination of its relationship with recognition, since the familiar ('constitutive') view that statehood is necessarily dependent upon recognition has tended to stand in the

(ed.), *China and the Question of Taiwan* (1973), pp. 169–71. But the Republic of China has had, since 1971, no status at all for United Nations purposes: cf. Stavropoulos, *International Lawyer*, 7 (1973), p. 71. During the debate which resulted in G.A. Res. 2758 (XXVI), by which the People's Republic of China was accepted as the proper representative of 'China' in the Assembly, the United States proposed a draft resolution providing for dual representation of China. Ambassador Bush, in proposing the item, stated that 'the U.N. should take cognizance of the existence of both the People's Republic of China and the Republic of China . . . [I]t should not be required to take a position on the respective conflicting claims . . . pending a peaceful reconciliation of the matter as called for by the Charter': U.N. Doc. A/8442; *International Legal Materials*, 10 (1971), p. 1100. The draft resolution was not put to the vote. See also *International Legal Materials*, 11 (1972), pp. 561–73.

<sup>1</sup> Cf. the terms of G.A. Res. 1514 (XV) ('Declaration on the Granting of Independence to Colonial Countries and Peoples'), paras. 3–5.

<sup>2</sup> Cf. Arangio-Ruiz, *L'état dans le sens du droit des gens et la notion du droit international* (Bologna, 1975), who identifies the notion of legal criteria for statehood with Kelsenian monism, which is rejected as inconsistent with the reality of a decentralized system. Instead he adumbrates the notion of 'puissances': factual 'entities' whose existence the international legal system takes for granted.

<sup>3</sup> See, however, Brownlie, *Principles of Public International Law* (2nd edn., 1973) (hereafter cited as Brownlie, *Principles*), pp. 74–82; Rousseau, *Droit international public*, vol. 2 (1974), pp. 13–44; Higgins, *Development*, pp. 11–57; Marek, *Identity and Continuity of States in Public International Law* (1955) (hereafter cited as Marek, *Identity and Continuity*), pp. 161–90; Lauterpacht, *Recognition in International Law* (1948) (hereafter cited as Lauterpacht, *Recognition*), pp. 26–32; Chen, *The International Law of Recognition* (1951), pp. 54–62; Kamanda, *A Study of the Legal Status of Protectorates in Public International Law* (1961), pp. 175–87; Antonowicz, *Polish Yearbook of International Law*, 1 (1966–7), pp. 195–207.

<sup>4</sup> See further *infra*, § 5.

<sup>5</sup> Noted by Jennings, *The Acquisition of Territory in International Law* (1963), pp. 11–12; Brownlie, *Principles*, p. 74.

<sup>6</sup> In addition to the works, cited already, by Lauterpacht (*supra*, n. 3), Chen (*supra*, n. 3), and Verhoeven (*supra*, p. 93, n. 2), see Charpentier, *La reconnaissance internationale et l'évolution du droit des gens* (1956); Erich, *Recueil des cours*, 13 (1926), pp. 427–507; Le Normand, *La reconnaissance internationale et ses diverses applications* (1899); Patel, *Recognition in the Law of Nations* (1959); Redslob, *Revue de droit international*, 13 (1934), pp. 429–83, and the works cited *infra*.



way of an independent examination of the concept of statehood in modern international law.

## 2. RECOGNITION AND STATEHOOD

It is often asserted that the 'formation of a new State is . . . a matter of fact and not of law'.<sup>1</sup> That proposition was thought to follow from the fundamental premiss of the so-called 'constitutive' theory of recognition, which held that 'a State is, and becomes an International Person through recognition only and exclusively'.<sup>2</sup> This equation of statehood with 'fact' precluded the development of an international law of territorial status independent of recognition; it was also adopted by writers of the 'declaratory' school of recognition,<sup>3</sup> amongst whom it was taken to assert the impossibility of criteria for statehood other than those based upon an overt or obvious form of effectiveness.<sup>4</sup>

It will be argued that neither theory of recognition satisfactorily explains modern State practice in this area. The declaratory theory assumes that territorial entities can be—by virtue of their mere 'existence'—readily classified as having the one particular legal status, and thus, in a way, confuses 'fact' with 'law'.<sup>5</sup> For, accepting that effectiveness is the dominant principle in this area, it must none the less be a *legal* principle. A State is not a fact in the sense that a chair is a fact; it is a fact in the sense in which it may be said that a treaty is a fact: that is, a legal status attaching to a certain state of affairs by virtue of certain rules.<sup>6</sup> And the declaratist's equation of fact with law also obscures the possibility that the creation of States might be regulated by rules premised on other fundamental principles—a possibility which, as we shall see, is borne out to some extent in modern practice. On the other hand, the constitutive theory, although it draws attention to the need for cognition, or identification, of the subjects of international law, and leaves open the possibility of taking into account relevant legal principles not based on 'fact', incorrectly identifies that cognition with diplomatic recognition, and fails to consider the possibility that identification of new subjects may be achieved by way of general rules, rather than on an *ad hoc*, discretionary, basis.

Fundamentally, the question is whether international law is itself, in one of its more important aspects, formally a coherent or complete system of law.<sup>7</sup> According to predominant nineteenth-century doctrine, there were no rules

<sup>1</sup> Oppenheim, *International Law*, vol. 1 (1st edn., 1905), p. 624; vol. 1 (8th edn., ed. Lauterpacht, 1955), p. 544; cf. Erich, loc. cit. (previous note), p. 442; Jones, this *Year Book*, 16 (1935), p. 5 at pp. 15–16; Marston, *International and Comparative Law Quarterly*, 18 (1969), p. 1 at p. 33; Arangio-Ruiz, op. cit. (above, p. 94 n. 2), pp. 8–9.

<sup>2</sup> Oppenheim, *International Law*, vol. 1 (1st edn.), p. 108; (8th edn.), p. 125.

<sup>3</sup> e.g. Chen, *The International Law of Recognition*, p. 38; but cf. pp. 8–9, 63.

<sup>4</sup> See the works cited *infra*, pp. 144 n. 1, 148 n. 1.

<sup>5</sup> Cf. Lauterpacht, *Recognition*, pp. 45–50, for an effective critique of the 'State as fact' dogma. His dismissal of the declaratory theory results in large part from his identification of the declaratory theory with this position.

<sup>6</sup> Cf. Kelsen, *Revue de droit international*, 4 (1929), p. 613. Waldock, *Recueil des cours*, 106 (1962), p. 5 at p. 146 correctly describes the problem as a 'mixed question of law and fact'.

<sup>7</sup> Cf. Chen, *The International Law of Recognition*, pp. 18–19.



determining what were 'States' for the purposes of other international law rules; the matter was within the discretion of existing recognized States.<sup>1</sup> The international law of that period thus exhibited a formal incoherence which was an expression of its radical decentralization.<sup>2</sup> But if international law is still, more or less, organizationally decentralized, it is generally assumed that it is a formally complete system of law. Certainly this is the case with respect to nationality, and the use of force. The inquiry into the relationship between statehood and recognition thus has considerable significance, not only in its own right but as bearing upon the formal coherence of international law as a system.

### I. THE EARLY VIEW OF RECOGNITION

Although the early writers occasionally dealt with problems of recognition, it had no separate place in the law of nations before the middle of the eighteenth century. The reason for this was clear: sovereignty, in its origin merely the location of supreme power within a particular territorial unit, necessarily came from within and therefore did not require the recognition of other States or princes. As Pufendorf stated:

... just as a king owes his sovereignty and majesty to no one outside his realm, so he need not obtain the consent and approval of other kings or states, before he may carry himself like a king and be regarded as such ... (I)t would be an injury for the sovereignty of such a king to be called in question by a foreigner.<sup>3</sup>

The only doubtful point was whether recognition by the parent State of a new State formed by revolution from it was necessary, and that doubt related to the obligation of loyalty to a superior, which, it was thought, might require release: the problem bore no relation to constitutive theory in general.<sup>4</sup> The position of recognition towards the end of the eighteenth century was as stated by Alexandrowicz:

In the absence of any precise and formulated theory, recognition had not found a separate place in the works of the classic writers whether of the naturalist or early positivist period, and this is the reason why Ompteda (1785) observes that nothing special has been written on the subject.<sup>5</sup>

When recognition did begin to attract more detailed consideration, about the middle of the century, it was in the context of recognition of monarchs, especially

<sup>1</sup> Oppenheim, *International Law*, vol. 1 (1st edn.), p. 108; *contra*, 8th edn., p. 126.

<sup>2</sup> The same incoherence has been noted in respect of the legality of war: Lauterpacht, *Recognition*, pp. v-vii, 4-5; and the discretionary character of nationality: Brownlie, *this Year Book*, 39 (1963), p. 284; cf. *Principles*, p. 73. Also Briggs, *Proceedings of the American Society of International Law*, 44 (1950), p. 169 at p. 172.

<sup>3</sup> *De Jure Naturae et Gentium Libri Octo* (1672) (trans. C. H. and W. A. Oldfather, 1934), Bk. VII, Ch. 3, para. 690.

<sup>4</sup> *Ibid.*; and cf. Vattel, *Le droit des gens* (1758) (trans. Fenwick, 1916), Bk. I, Ch. 17, §202; Gentili, *On the Law of War* (1612), Bk. I, §§ 185-7. See further Frowein, *American Journal of International Law*, 65 (1971), pp. 568-71.

<sup>5</sup> *This Year Book*, 34 (1958), p. 176.

elective monarchs; that is, in the context of recognition of governments. Von Steck<sup>1</sup> and later Martens<sup>2</sup> discussed the problem, reaching similar conclusions. Recognition, at least by third States in the case of secession from a metropolitan State, was either illegal intervention or it was unnecessary.<sup>3</sup> As one writer put it:

... in order to consider the sovereignty of a State as complete in the Law of Nations, there is no need for its recognition by foreign powers; though the latter may appear useful, the *de facto* existence of sovereignty is sufficient.<sup>4</sup>

Thus, even after the concept of recognition had become a separate part of the law, the position was still consistent with the views held by the early writers. Alexandrowicz puts the matter as follows:

The writers of the early period of eighteenth century positivism, whenever faced with the eventuality of recognition as a medium of fitting the new political reality into the law, on the whole rejected such a solution, choosing the solution more consistent with the natural law tradition. Even if the law of nations was conceived as based on the consent of States, this anti-naturalist trend was not yet allowed to extend to the field of recognition.<sup>5</sup>

## 2. POSITIVISM AND RECOGNITION

But this was, it is clear, a temporary accommodation. According to positivist theory, the obligation to obey international law derived from the consent of individual States. If a new State subject to international law came into existence, new legal obligations would be created for existing States. The positivist premiss therefore required consent—either to the creation of the State itself or to its being subject to international law with respect to the States affected. It would be interesting to trace the evolution of international law doctrine from the essentially declaratory views of Martens and von Steck to the essentially constitutive ones of Hall and Oppenheim.<sup>6</sup> The important point is, however, that the shift in doctrine did happen, although it was a gradual one, in particular because, while States commonly endorsed the positivist view of international law, their practice was not always consistent with this profession. Thus unrecognized States and native peoples with some form of regular government were in practice given the benefit of, and thought to be obliged by, the whole *corpus* of international law.<sup>7</sup> The problem was thus largely theoretical, but it was none the less influential. For if one starts from the premiss that 'Le droit des

<sup>1</sup> *Versuche über verschiedene Materien politischer und rechtlicher Kenntnisse* (1783).

<sup>2</sup> *A Compendium of the Law of Nations* (1789), pp. 18 ff.

<sup>3</sup> Alexandrowicz, loc. cit. (above, p. 96 n. 5), pp. 180 ff. and authorities there cited.

<sup>4</sup> Saalfeld, *Handbuch des positiven Völkerrechts* (1833), p. 26; cited by Alexandrowicz, loc. cit. (above, p. 96 n. 5), p. 189.

<sup>5</sup> Ibid., p. 191. Cf. also the same author, this *Year Book*, 37 (1961), pp. 506–15.

<sup>6</sup> Wheaton's view that the 'external' sovereignty of a State is, but its 'internal' sovereignty is not, dependent upon recognition may be taken as an intermediate point: *Elements of International Law* (3rd edn., 1846), pp. 55–7. For his earlier hesitations see his 1st edn. (1836), pp. 192–4.

<sup>7</sup> Smith, *Great Britain and the Law of Nations*, vol. 1 (1932), pp. 14–18.

gens est un droit contractuel entre des États',<sup>1</sup> the conclusion as to recognition and statehood seems to be inevitable:

. . . le droit international, qui est contractuel et qui a par conséquent la liberté immanente de s'étendre aux partenaires de son choix, comprend tels États dans sa communauté et n'y accueille pas tels autres . . . [L]a reconnaissance est un accord. Elle signifie l'extension de la communauté de droit international à un nouvel Etat.<sup>2</sup>

### 3. STATEHOOD IN NINETEENTH-CENTURY INTERNATIONAL LAW

It would seem useful here to attempt a summary of the position with regard to statehood and recognition in the nineteenth century. There was of course no complete unanimity among text-writers; nevertheless, what we find is an inter-related series of doctrines, based on the premiss of positivism, the effect of which was that the formation and even the existence of States was a matter outside the then accepted scope of international law. Oppenheim's *International Law* provides the clearest as well as probably the most influential expression of these inter-related doctrines. The main positions relevant here were as follows:

1. International law was regarded as the law existing between civilized nations. In 1859 the British Law Officers spoke of international law 'as it has been hitherto recognized and now subsists by the common consent of Christian nations'.<sup>3</sup> Members of the society whose law was international law were the European States between whom it evolved from the fifteenth century onwards, and those other States accepted expressly or tacitly by the original members into the Society of Nations; for example the United States of America and Turkey.<sup>4</sup> This satisfied the positivist canon that could discover obligation to obey international law only in the consent of States.

2. Accordingly how a State *became* a State was a matter of no importance to traditional international law, which concentrated on recognition as the agency of admission into 'civilized society'—a sort of juristic baptism, entailing the rights and duties of international law. 'Pre-states' had not consented to be bound by international law, nor had other States accepted them. States *in*

<sup>1</sup> Redslob, *Revue de droit international*, 13 (1934), p. 429 at pp. 430-1.

<sup>2</sup> Ibid. It should be noted that the essential theoretical problem related to the duties of the new State rather than its rights. Existing States could consent to the rules of law in respect of yet-to-be-created States, but those States could not for their part so consent: e.g. Anzilotti, *Corso di Diritto Internazionale*, vol. 1 (3rd edn., 1929), pp. 163-6, cited by Jaffé, *Judicial Aspects of Foreign Relations* (1933), p. 90 n. Cf., however, Lauterpacht, *Recognition*, p. 2.

<sup>3</sup> Opinion of Harding, Bethell and Keating, 18 November 1859: cited Smith, *Great Britain and the Law of Nations*, vol. 1 (1932), p. 12.

<sup>4</sup> Oppenheim, *International Law*, vol. 1 (1st edn.), p. 17; (8th edn.), p. 18. On Turkey's 'membership' see Smith, *op. cit.* (previous note), vol. 1, pp. 16-17; Hall, *International Law* (2nd edn., 1884), p. 40; Wood, *American Journal of International Law*, 37 (1943), pp. 262-74. In the *European Commission of the Danube, P.C.I.J.*, Series B, No. 14 (1927), p. 40, Art. VII of the Treaty of Paris was referred to as bringing about 'the elevation of the position of Turkey in Europe'. But cf. Judge Ammoun, *Barcelona Traction case (Second Phase)*, *I.C.J. Reports*, 1970, p. 3 at pp. 308-9.



*statu nascendi* were in no sense international persons. How they acquired territory, what rights and duties they had or owed to others as a result of activities before they were recognized as States, these were irrelevant to international law:

The formation of a new State is, as will be remembered from former statements, a matter of fact and not of law. It is through recognition, which is a matter of law, that such new State becomes subject to International Law. As soon as recognition is given, the new State's territory is recognized as the territory of a subject of International Law, and it matters not how this territory is acquired before the recognition.<sup>1</sup>

Hence also, the acquisition of territory by a new State was not regarded as a mode of acquisition of territory in international law, though revolt was a method of losing territory: 'Revolt followed by secession is a mode of losing territory to which no mode of acquisition corresponds.'<sup>2</sup>

#### 4. RECOGNITION OF STATES IN MODERN INTERNATIONAL LAW

It is against this background that the modern law of statehood, and its relationship with recognition, must be examined. The effect of the positivist doctrine was to place all the emphasis, in matters of statehood, on the question of recognition.<sup>3</sup> And this is still so as far as the municipal law of many States is concerned; for example, English courts will not determine for themselves any questions of statehood in issue before them, even where the matter is between private citizens.<sup>4</sup> They will sometimes be able to avoid the unnecessary and sometimes harmful effects on private rights of the commonly political act of recognition by means of construction.<sup>5</sup> The executive will on occasions leave the matter, in substance, for the courts to decide.<sup>6</sup> But where the international status of any entity is squarely in issue, executive certification is binding.<sup>7</sup>

<sup>1</sup> Oppenheim, *International Law*, vol. 1 (1st edn.), p. 264; (8th edn.), p. 544. Cf. Phillimore, *Commentaries upon International Law*, vol. 1 (2nd edn., 1871), p. 79.

<sup>2</sup> Oppenheim, *International Law*, vol. 1 (1st edn.), p. 297; (8th edn.), p. 579.

<sup>3</sup> As both Verhoeven and Charpentier have pointed out, the rubric 'recognition' covers a very wide variety of situations. The term here is used to indicate the relatively formal diplomatic recognition of States and governments.

<sup>4</sup> This was not always so: e.g. *Yrisarri v. Clement*, (1825) 2 C. & P. 223 at p. 225 *per* Best C.J. For an illuminating discussion of the cases in which Lord Eldon laid down the modern rule see Bushe-Foxe, this *Year Book*, 12 (1931), pp. 63-75; *ibid.*, 13 (1932), pp. 39-48. See also Jaffé, *Judicial Aspects of Foreign Relations*, p. 79.

<sup>5</sup> *Luigi Monta of Genoa v. Cechofracht Co. Ltd.*, [1956] 2 Q.B. 552 (term 'government' in a charter party); *Kawasaki Kisen Kaisha of Kobe v. Bantham Steamship Co. Ltd.*, [1939] 2 K.B. 544 (C.A.) ('war'). For an extreme case of 'construction' see *The Arantzazu Mendi*, [1939] A.C. 256, criticized by Lauterpacht, *Recognition*, pp. 288-94.

<sup>6</sup> *Duff Development Co. Ltd. v. Kelantan Government*, [1924] A.C. 797 at p. 825 *per* Lord Sumner; and cf. the certificate in *Salimoff v. Standard Oil Co.*, 262 N.Y. 220 (1933), just prior to U.S. recognition of the Soviet government.

<sup>7</sup> *Luther v. Sagor*, [1921] 3 K.B. 532; but cf. *Carl Zeiss Stiftung v. Rayner and Keeler Ltd.* (No. 2), [1967] 1 A.C. 853, esp. at pp. 953-4 *per* Lord Wilberforce. The modern American position is less rigid: *Wulfsohn v. R.S.F.S.R.*, 234 N.Y. 372 (1923); *Solokoff v. National City Bank*, 239 N.Y. 158 (1924); *Bank of China v. Wells Fargo Bank & Union Trust Co.*, 104 F. 2d. 467 (1953), and for discussion see O'Connell, *International Law* (2nd edn., 1970), vol. 1, pp. 172-81.

However necessary or desirable it may be that the courts of a State should speak on matters of statehood with the same voice as the government of that State, in the international sphere the intimate connection established by nineteenth-century doctrine between recognition and statehood has done considerable harm. For a tension is thereby created between the conviction of lawyers, over a wide philosophical spectrum, that recognition is, despite its political overtones, essentially a legal act in the international sphere,<sup>1</sup> and that of politicians that they are, or should be, free to determine (once an entity possesses the requisite qualifications) the question of recognition on political grounds. This has led to some curious attempts at reconciliation.<sup>2</sup> The United Kingdom alone seems to have accepted a duty to recognize;<sup>3</sup> and even its position is by no means an assertion of the constitutive theory of recognition.<sup>4</sup>

Before examining State practice, however, it is necessary again to refer to the doctrinal conflict over the nature of recognition. For a further effect of nineteenth century practice has been to focus attention more or less exclusively on the act of recognition itself, and its legal effects, rather than on the problem of the elaboration of rules determining the status, competence and so on of the various territorial, governmental units.<sup>5</sup> To some extent this was inevitable, as long as the constitutive position retained its influence, for a corollary of that position was, as we have seen, that there could be no such rules. Examination of the constitutive theory is, therefore, first of all necessary.

#### (i) *The constitutive theory*<sup>6</sup>

The tenets of the strict constitutive position, as adopted by Oppenheim and others, have been referred to already. Many, if not most, of the adherents of

<sup>1</sup> Kelsen, *American Journal of International Law*, 35 (1941), pp. 605-17; Schwarzenberger, *International Law* (3rd edn., 1957), pp. 127-36 at p. 134; Lauterpacht, *Recognition*, p. 6 and *passim*.

<sup>2</sup> Alexander, *American Journal of International Law*, 46 (1957), pp. 631-40. Much the same tension exists over the relationship between United Nations membership and recognition.

<sup>3</sup> Cf. *International Law Quarterly*, 4 (1951), pp. 387-8; Akehurst, *A Modern Introduction to International Law* (2nd edn., 1971), pp. 81-2.

<sup>4</sup> In 1948, the British position, while supporting a duty to recognize, was that: 'the existence of a State should not be regarded as depending upon its recognition but on whether in fact it fulfils the conditions which create a duty for recognition' (U.N. Doc. A/CN. 4/2 (1948), p. 53). It is significant that Lauterpacht relies heavily on the practice of U.K. and U.S. courts in recognition cases: e.g. *Recognition*, pp. 44, 70-3. He regards this practice as consistently constitutive, and hence tends to minimize the importance of the exceptions to the non-recognition rule accepted in U.S. courts (*ibid.*, pp. 146-7). However, the difference between modern British and American practice is better explained by the differences in the operation of the principle of non-justiciability of 'political' disputes. British judicial practice is not, therefore, based on a particular view of the international law of recognition: but cf. *ibid.*, pp. 154-5. For discussion of the changing U.S. practice in recognition cases see *Bank of China v. Wells Fargo Bank & Union Trust Co.*, 104 F. Supp. 59 (1952) at pp. 63-6.

<sup>5</sup> Cf. Bot, *Non-Recognition and Treaty Relations* (1968), p. 1.

<sup>6</sup> Constitutive writers include the following: Kelsen, *loc. cit.* (above, n. 1); Schwarzenberger, *International Law*, vol. 1, p. 134; Anzilotti, *op. cit.* (above, p. 98 n. 2); Redslob, *loc. cit.* (above, p. 98 n. 1); Lauterpacht, *Recognition*; Jellinek, *Allgemeine Staatslehre* (5th edn., 1928), p. 273; Le Normand, *op. cit.* (above, p. 94 n. 6); Patel, *op. cit.* (above, p. 94 n. 6), pp. 119-22; Jennings, *Recueil des cours*, 121 (1967), pp. 327-605 at p. 350; Devine, *Acta Juridica*, 1973, p. 1 at pp. 90-145; Verzijl, *International Law in Historical Perspective*, vol. 2 (1969), pp. 587-90



the constitutive position are also positivist in outlook.<sup>1</sup> On the other hand, it may well be possible to reconcile the declaratory theory with positivism, and it is certainly true that many writers have been both declaratory and positivist.<sup>2</sup> Moreover Lauterpacht, who was not a positivist, was one of the more subtle and persuasive proponents of a form of the constitutive position.<sup>3</sup> Apart from the general tenets of positivism, the most persuasive argument for the constitutive position is a distinct one. Lauterpacht expresses it in the following way:

[T]he full international personality of rising communities . . . cannot be automatic . . . [A]s its ascertainment requires the prior determination of difficult circumstances of fact and law, there must be *someone* to perform that task. In the absence of a preferable solution, such as the setting up of an impartial international organ to perform that function, the latter must be fulfilled by States already existing. The valid objection is not against the fact of their discharging it, but against their carrying it out as a matter of arbitrary policy as distinguished from legal duty.<sup>4</sup>

In other words, it is said that, in every legal system, some organ must be competent to determine with finality and certainty the subjects of the system. In the present international system, that organ can only be the States, acting severally or collectively. Since they act as organs of the system, their determinations must have definitive legal effect.

It is first of all clear that this argument is not generally applicable in modern international law. Determining the legality of the use of force, or the violation or termination of a treaty, may involve 'difficult circumstances of fact and law', but it could not be contended that the determination of particular States as to such matters was 'constitutive' or conclusive. Were that so, international law would be merely a system of imperfect communications: every rule of international law would be the subject of, in effect, an 'automatic reservation' with respect to every State (in the absence of the compulsory jurisdiction of some court or tribunal).

If it is argued that the problem of determining the subjects of international law is so important that, exceptionally, there must exist some method of

(with reservations). Hall's position is of interest: 'although the right to be treated as a state is independent of recognition, recognition is the necessary evidence that the right has been acquired': *International Law* (8th edn., 1924, ed. Higgins), p. 103. Cf. also the German argument in the *Customs Union* case, *P.C.I.J.*, Series C, No. 53 at pp. 52-3. It is argued that the Permanent Court adopted a constitutive position in *Certain German Interests in Polish Upper Silesia*, *P.C.I.J.*, Series A, No. 7 (1926), at pp. 27-9, but this was in the context of the belligerency of the Polish National Committee, not the existence of Poland as a State.

<sup>1</sup> Lauterpacht, *Recognition*, pp. 38-9; but cf. Jaffé, *op. cit.* (above, p. 98 n. 2), pp. 80-1.

<sup>2</sup> Cf. Chen, *The International Law of Recognition*, p. 18 n. 41.

<sup>3</sup> Lauterpacht, *Recognition*, at p. 2, distinguishes two major assertions of orthodox constitutive theory: viz. 'that, prior to recognition, the community in question possesses neither the rights nor the obligations which international law associates with full Statehood; (and) . . . that recognition is a matter of absolute political discretion as distinguished from a legal duty owed to the Community concerned'. Lauterpacht adopts the first but not the second of these propositions. It can be seen that neither is distinctly positivist: what is so is their combination. Cf. Kunz, *American Journal of International Law*, 44 (1950), pp. 731-9; Higgins, *Development*, p. 136.

<sup>4</sup> *Recognition*, p. 55 (his italics); cf. Kelsen, *loc. cit.* (above, p. 100 n. 1), pp. 606-7.



conclusive determination, yet it is difficult to see that equating the individual States with the centralized organ of the 'normal' legal system has that effect. There would be nothing conclusive or certain (as far as other States were concerned) about a conflict between different States as to the status of a particular entity. Moreover, it is not necessarily the case that problems of status are peculiarly important in practice. International law has relatively few subjects, and the status of a great majority of them is not open to serious doubt. On the other hand, problems relating, for example, to the legality of the use of force occur with unfortunate frequency, and are often of very great difficulty. Fortunately, it is not argued that individual State pronouncements should therefore be definitive.<sup>1</sup>

Two further arguments add decisive support to the rejection of the constitutivist position. In the first place, if State recognition is, *pro tanto*, determinative then it is difficult to conceive of an illegal recognition, and quite impossible to conceive of a recognition which is invalid or void. Yet the invalidity of certain acts of recognition has been accepted in practice, and rightly so.<sup>2</sup> Otherwise recognition would constitute an alternative form of intervention. It is of interest that Lauterpacht himself, in at least one place, allowed the possibility of an *invalid* act of recognition.<sup>3</sup> If that is possible, then the test for recognition must be extrinsic to the act of recognition; that is, established by general international law. And that is a denial of the constitutive position.

A second difficulty with the constitutive position is its relativism. As Kelsen points out, it follows from the constitutive theory that:

... the legal existence of a state ... has a relative character. A state exists legally only in its relations to other states. There is no such thing as absolute existence.<sup>4</sup>

To those who do not share Kelsen's philosophical premisses, this seems a violation of common sense.<sup>5</sup> Lauterpacht, who accepts the relativity of recognition as inherent in the constitutive position, nevertheless refers to it as a 'glaring anomaly'<sup>6</sup> and a 'grotesque spectacle' casting 'grave reflection upon international law'.<sup>7</sup> Moreover, in his opinion, 'It cannot be explained away, amidst some complacency, by questionable analogies to private law or to

<sup>1</sup> Lauterpacht accepts that the decentralized function of recognition is quite unsatisfactory: *Recognition*, p. 67. He thus has to rely on an unsatisfactory situation as the chief support for his position.

<sup>2</sup> e.g. the German and Soviet 'recognition' of the 'extinction' of the Polish State in 1939: Secret Protocol to the Non-Aggression Pact of 23 August 1939: *British and Foreign State Papers*, vol. 143, p. 503 (Pact); Grenville, *The Major International Treaties 1914-1973* (1974), p. 200 (Protocol). On Poland after 1939 see Marek, *Identity and Continuity*, pp. 417-526, and works there cited.

<sup>3</sup> He regarded Italian and German recognition of the Franco regime as 'illegal *ab initio*': *Recognition*, p. 234 n. 3; cf. p. 95 n. 2.

<sup>4</sup> Kelsen, loc. cit. (above, p. 100 n. 1), p. 609. But cf. Maryan Green, *International Law* (1973), p. 34.

<sup>5</sup> Cf. Verhoeven, *Reconnaissance*, pp. 714-15. Kelsen himself was previously declaratist: *Revue de droit international*, 4 (1929), p. 613 at pp. 617-18: 'en présence des règles positives incontestables du droit international, [on] ne peut nier que l'État nouveau ait des droits et des obligations internationales avant même d'être reconnu par les anciens États.'

<sup>6</sup> *Recognition*, p. 67.

<sup>7</sup> Ibid., p. 78.

philosophical relativism.<sup>1</sup> But if a central feature of the constitutive position is open to such criticism, the position itself must be regarded as questionable. Moreover, aside from the various logical objections,<sup>2</sup> Lauterpacht's position is dependent on a straightforward assertion as to State practice:

. . . [M]uch of the available evidence points to what has here been described as the legal view of recognition. Only that view of recognition, coupled with a clear realization of its constitutive effect, permits us to introduce a stabilizing principle into what would otherwise be a pure exhibition of power and a negation of order . . .<sup>3</sup>

But State practice demonstrates neither acceptance of a duty to recognize,<sup>4</sup> nor a consistent constitutive view of recognition. Moreover, Lauterpacht's argument, which in the passage cited was almost avowedly *de lege ferenda*,<sup>5</sup> assumes the insufficiency of the declaratory view of recognition.

## (ii) *The declaratory theory*

According to the declaratory theory, recognition of new States is a political act which is in principle independent of the existence of the new State as a full subject of international law.<sup>6</sup> In Charpentier's terminology, statehood is opposable to non-recognizing States.<sup>7</sup> This position has the merit of avoiding the logical and practical difficulties involved in constitutive theory, while still accepting a role for recognition in modern practice. It has the further, essential, merit of consistency with that practice, and it is supported by a substantial body of opinion, both judicial and academic. What is regarded as the *locus classicus* is a passage of Taft C. J.'s award in the *Tinoco* arbitration:

The non-recognition by other nations of a government claiming to be a national personality, is usually appropriate evidence that it has not attained the independence and control entitling it by international law to be classed as such. But when recognition *vel non* of a government is by such nations determined by enquiry, not into its *de facto* sovereignty and complete governmental control, but into its illegitimacy or irregularity of origin, their non-recognition loses something of evidential weight on the issue with which those applying the rules of international law are alone concerned . . . Such non-recognition for any reason . . . cannot outweigh the evidence disclosed . . . as to the *de facto* character of Tinoco's government, according to the standard set by international law.<sup>8</sup>

<sup>1</sup> Ibid.

<sup>2</sup> A further logical objection relates to the difficulty of a duty to recognize an entity which has, prior to recognition, *ex hypothesi* no rights: see *Recognition*, pp. 74-5, 191-2. In Lauterpacht's view, the community is 'entitled to claim recognition', but this is an unenforceable or imperfect right. Even so, if it is a legal right then *cadit quaestio*. Cf. Chen, *The International Law of Recognition*, pp. 52-4.

<sup>3</sup> *Recognition*, pp. 77-8.

<sup>4</sup> Cf. Verhoeven, *Reconnaissance*, pp. 576-86.

<sup>5</sup> Cf. *Recognition*, p. 78.

<sup>6</sup> See Chen, *The International Law of Recognition*, for a full discussion of this position. It is of interest that L. C. Green's annotations to the published edition are consistently constitutivist: in this respect Green follows Schwarzenberger rather than Chen.

<sup>7</sup> Charpentier, *op. cit.* (above, p. 94 n. 6), pp. 15-68, 160-7.

<sup>8</sup> *American Journal of International Law*, 18 (1924), p. 147 at p. 154. Cf. also the *Hopkins* claim, *ibid.*, 21 (1927), p. 160 at p. 166; *Cuculla v. Mexico* (1868), Moore, *International Arbitrations*, vol. 3, p. 2873 at pp. 2876-7; *Wulfsohn v. R.F.S.F.R.*, 138 N.E. 24 (1923) *per* Andrews J. at p. 25; app. diss. 266 U.S. 580 (1924).



But this was a case of recognition of governments, and it is arguable that, while recognition of governments might be declaratory in effect, recognition of new States is not. Where an authority in fact exercises governmental functions within an area accepted as being already a 'State-area', there might seem to be nothing for recognition to constitute, at least at the level of international personality. On the other hand, recognition of a new State involves the demarcation of a certain area as a 'State-area' for the purposes of international relations, with consequent effect upon the rights and duties of other States. In such a case, it might be argued that recognition, at least in the non-formal sense of 'treating like a State', is central rather than peripheral to the issue of international capacity.<sup>1</sup>

But legal opinion in the context of recognition of States also seems to contradict this view. As a German-Polish Mixed Arbitral Tribunal stated in reference to the existence of the new State of Poland:

. . . the recognition of a State is not constitutive but merely declaratory. The State exists by itself and the recognition is nothing else than a declaration of this existence, recognized by the States from which it emanates.<sup>2</sup>

Less well known in this context is the Report of the Commission of Jurists on the *Aaland Islands*. The passage of the Report dealing with the independence of Finland enumerated the various recognitions given to Finland, but went on to say that:

these facts by themselves do not suffice to prove that Finland, from this time onwards, became a sovereign State . . . [T]he same legal value cannot be attached to recognition of new States in war-time, especially to that accorded by belligerent powers, as in normal times . . . In addition to these facts which bear upon the external relations of Finland, the very abnormal character of her internal situation must be brought out. This situation was such that, for a considerable time, the conditions required for the formation of a sovereign State did not exist.<sup>3</sup>

It will be seen that the Jurists, while accepting the legal value of recognition as evidence, were not prepared to accept it as conclusive, but instead referred to the 'conditions required for the formation of a sovereign State' apart from recognition.<sup>4</sup>

<sup>1</sup> This was Le Normand's view: *op. cit.* (above, p. 94 n. 6), p. 268; cited Chen, *The International Law of Recognition*, p. 14 n. 1.

<sup>2</sup> *Deutsche Continental Gas Gesellschaft v. Polish State* (1929), *Annual Digest*, 5 (1929-30), No. 5.

<sup>3</sup> *League of Nations Official Journal*, Special Supplement No. 4 (1920), p. 8.

<sup>4</sup> The Report of the Commission of Rapporteurs is less explicit. Certain passages are at least capable of a constitutive interpretation: e.g. League of Nations, Council Doc. B7: 21/68/106 (1921), p. 23. But the crucial element in the Rapporteurs' argument was the continuity between the independent State of Finland after 1917 and the autonomous State of Finland before 1917. This continuity was regarded as a continuity of legal personality, despite absence of recognition of pre-1917 Finland: cf. the reference to 'an autonomous Finland which . . . on the 6th December 1917, proclaimed her full and entire independence of Russia, detached herself from the latter by an act of her own free will, and became thereafter herself a sovereign State instead of a dependent State' (*ibid.*, p. 22).



Among writers the declaratory doctrine, with differences in emphasis, is now predominant. Brownlie states the position succinctly:

Recognition, as a *public act of state*, is an optional and political act and there is no legal duty in this regard. However, in a deeper sense, if an entity bears the marks of statehood, other states put themselves at risk legally, if they ignore the basic obligations of state relations.<sup>1</sup>

Moreover, States do not in practice regard unrecognized States as exempt from international law,<sup>2</sup> and they do in fact carry on a certain, often quite considerable, amount of informal intercourse, extending even to joint membership of the various inter-State organizations.<sup>3</sup> Recognition is increasingly intended and taken as an act, if not of political approval, at least of political accommodation.<sup>4</sup>

## 5. CONCLUSIONS

It is sometimes suggested that the 'great debate' over the legal nature of recognition has been beside the point, and that it is mistaken to categorize recognition as either declaratory or constitutive.<sup>5</sup> French writers, following

<sup>1</sup> *Principles*, p. 94 (his italics); cf. pp. 90-3. Other declaratist writers include: O'Connell, *International Law*, vol. 1, pp. 123-34; Chen, *The International Law of Recognition*; Brierly, *The Law of Nations* (6th edn., 1963), p. 139; Charpentier, op. cit. (above, p. 94 n. 6), pp. 196-200; Starke, *Studies in International Law*, pp. 91-100; Marek, *Identity and Continuity*, pp. 130-61; Fawcett, *The Law of Nations* (2nd edn., 1971), pp. 49, 55; Higgins, *Development*, pp. 135-6; Akehurst, *A Modern Introduction to International Law* (2nd edn., 1971), pp. 78-9; Jaffé, *Judicial Aspects of Foreign Relations*, pp. 97-8; Erich, *Recueil des cours*, 13 (1926), p. 427 at pp. 457-68; Kunz, *American Journal of International Law*, 44 (1950), pp. 713-19; Borchard, *ibid.*, 36 (1942), pp. 108-11; Brown, *ibid.*, pp. 106-8; Waldock, *Recueil des cours*, 106 (1962-II), pp. 147-51. See also the Resolutions of the *Institut de Droit International* (1936): 'La reconnaissance a un effet déclaratif. L'existence de l'État nouveau avec tous les effets juridiques qui s'attachent à cette existence n'est pas affectée par le refus de reconnaissance d'un ou plusieurs États': Wehberg (ed.), *Institut de Droit International, Table Général des Résolutions 1873-1956* (1957), p. 11; and cf. Brown, *Annuaire de l'Institut*, 1934, pp. 302-57. See also *Temple case*, *I.C.J. Reports*, 1962, p. 6 at pp. 130-1 (Judge Spender, dissenting).

<sup>2</sup> Brownlie, *Principles*, p. 92 n.; Briggs, *American Journal of International Law*, 43 (1949), p. 113 at pp. 117-20; Charpentier, op. cit. (above, p. 94 n. 6), pp. 45-8, 56-68; Whiteman, *Digest*, vol. 2, at pp. 604-65. Cf. the Protocol of the London Conference, 19 February 1831: *British and Foreign State Papers*, vol. 18, pp. 779, 781 (Belgium); Marek, *Identity and Continuity*, p. 140. Non-recognition of North Korea and of Israel was not regarded as precluding the application of international law rules to the Korean and Middle East wars: Brownlie, *International Law and the Use of Force by States*, p. 380 and n.

<sup>3</sup> Bot, *Non-Recognition and Treaty Relations* (1968); and see Whiteman, *Digest*, vol. 2, pp. 524-604; Moore, *Digest*, vol. 1, pp. 206-35; Hackworth, *Digest*, vol. 1, pp. 327-63, for details of these informal contacts. Failure to comply with international law is often cited as a justification for non-recognition.

<sup>4</sup> Cf. Lachs, this *Year Book*, 35 (1959), p. 252 at p. 259; Higgins, *Development*, pp. 164-5. Verhoeven goes so far as to conclude that recognition is 'un acte purement politique, dépourvu comme acte de volonté d'effets de droit': *Reconnaissance*, p. 721. This follows from his basic thesis of the diversity of 'recognitions', and of the relations or situations being recognized. But it does not follow that recognition may not have legal effects in a particular case or type of case. What does follow is the need to study the particular types of case, rather than 'recognition' simply.

<sup>5</sup> Cf. Akehurst, *A Modern Introduction to International Law* (2nd edn., 1971), p. 78.

de Visscher, have tended to regard recognition as combining both elements.<sup>1</sup> To some extent one can sympathize with these views: none the less, the proper position is that in principle the denial of recognition to an entity which otherwise qualifies as a State cannot entitle the non-recognizing States to act as if the entity in question were not a State. The categorical constitutive position, which implies the contrary view, is unacceptable. But it would be equally unacceptable to deny that, in practice, recognition can have important legal and political effects. For example, where an entity is widely recognized as a State, especially where such recognition has been accorded on non-political grounds, that is strong evidence of the statehood of that entity—though it is not conclusive.<sup>2</sup> Equally, where the status of a particular entity is doubtful, or where some necessary element is lacking, recognition, apart from its evidential importance, may oblige the recognizing State to treat the recognized entity as a State, and may thus contribute towards the consolidation of its status. In Charpentier's terms, recognition may render opposable a situation otherwise inopposable.<sup>3</sup>

In some situations, too, States may without acting unlawfully recognize an entity as a State even though it clearly does not qualify as such: in these circumstances bilateral legal obligations may be created, but the personality of the entity in question remains particular and non-opposable.<sup>4</sup> Similarly, the term 'recognition' is sometimes used to describe acts which are properly speaking constitutive of a particular State or legal person: for example, a multilateral treaty establishing a new State will extend the signatories' recognition of that State. This situation is to be distinguished from that where the State or entity existed prior to the treaty, which merely confirms the status as recognized.<sup>5</sup>

The tentative conclusion is that the international status of an entity 'subject to international law' is, in principle, independent of recognition, although the qualifications already made suggest that the differences between the declaratory and constitutive schools are less in practice than might have been expected. This conclusion is tentative only, in that it assumes that there exist in international law and practice workable criteria for statehood. If there are no such

<sup>1</sup> de Visscher, *Problèmes d'interprétation judiciaire en droit international public* (1963), p. 191; cited by Salmon, *La reconnaissance d'état* (1971), pp. 19 ff. Cf. Charpentier, op. cit. (above, p. 94 n. 6), *passim*; de Visscher, *Théories et réalités en droit international public* (4th rev. edn., 1970), p. 258. Verhoeven, *Reconnaissance*, at p. 548, refers in the same vein to a 'dialectical relationship' between recognition and the criteria for statehood, although his basic position remains declaratist: *ibid.*, pp. 545, 714–15, 720.

<sup>2</sup> Cf. Taft C.J., *Tinoco arbitration*; cited *supra*, p. 103.

<sup>3</sup> Charpentier, op. cit. (above, p. 94 n. 6), pp. 217–25.

<sup>4</sup> For example, Byelorussia and the Ukraine, constituent republics of the Soviet Union, were admitted as 'States' to the United Nations in 1945, and have subsequently been treated as such for all United Nations purposes, although they are clearly not independent. For the decision in 1945 see *United States Foreign Relations*, 1945, *The Conferences at Malta and Yalta*, pp. 746–7, 975–9; and see also Timasheff, *Fordham Law Review*, 14 (1945), pp. 180–90; Dolan, *International and Comparative Law Quarterly*, 4 (1955), pp. 629–39; and especially Uibopuu, *ibid.*, 24 (1975), pp. 211–45. British India in the period 1919–47 was also recognized as having a separate legal personality, in much the same way: see Poulou, this *Year Book*, 45 (1971), pp. 202–12.

<sup>5</sup> But cf. Wright, *Proceedings of the American Society of International Law*, 48 (1954), pp. 23–37.



criteria, or if they are so imprecise as to be practically useless, then recognition must be in practice discretionary, as well as determinative, and the constitutive position will have returned, as it were, by the back door.<sup>1</sup> The question whether such criteria do exist remains to be resolved.<sup>2</sup>

### 3. THE CONCEPT OF STATEHOOD IN INTERNATIONAL LAW: SOME GENERAL OBSERVATIONS

If the effect of positivist doctrine in international law was to place the emphasis, in matters of statehood, on the question of recognition, then the effect of modern doctrine and practice has been to return the attention to issues of statehood and status, independent of recognition. But there is nevertheless no generally accepted and satisfactory contemporary legal definition of statehood.<sup>3</sup> This may well be because the question normally arises only in the borderline cases, where a new entity has emerged bearing some but not all of the characteristics of undoubted States. International lawyers are thus confronted with difficult problems of characterization; and, as has been suggested, such problems do not occur, and cannot be solved, except in relation to the particular issues and circumstances.<sup>4</sup> But, it may be asked, are there any legal consequences which attach to statehood as such, but which are not legal incidents of other forms of international personality? To put it another way, is there a legal concept of statehood, or does the meaning of the term vary infinitely depending on the context?<sup>5</sup> We have discussed the attempt to dispense with criteria for statehood by way of recognition.<sup>6</sup> On the other hand some modern writers come close to denying the existence of statehood as a legal concept in the

<sup>1</sup> Cf. Anzilotti, *Corso di diritto internazionale*, vol. 1 (3rd edn., 1929), pp. 163–6.

<sup>2</sup> *Post*, pp. 111 ff.

<sup>3</sup> Both the League's Committee of Experts for the Progressive Codification of International Law (see their *Minutes* (ed. Rosenne, 1972), vol. 1, pp. 38–9), and the International Law Commission have consistently rejected proposals to codify rules relating to recognition and statehood. Cf. Lauterpacht, *Collected Papers*, vol. 1, pp. 477–9. For debates on the issue in the I.L.C., see e.g., *I.L.C. Yearbook*, 1949, pp. 64–8, 81–8, 150–2, 171–4, 178; *ibid.*, 1956–II, p. 107; *ibid.*, 1966–II, pp. 178, 192; *ibid.*, 1970–II, pp. 178, 306. The rather delicate balance between reluctance and need to deal with the issue is demonstrated in the Draft Articles on State Succession in respect of Treaties; Art. 2 para. 1 (e) defines the 'succession of States' by reference to the 'fact of succession'; but Art. 6 provides that only successions of States occurring consistently with international law are governed by the Articles. Cf., however, Vallat, *I.L.C. Yearbook*, 1974–II (1), pp. 18–19, for a reassertion of the long-standing position.

The topic of recognition of States and governments has remained on the I.L.C. work programme since 1949, but little interest has been shown in pursuing the matter. At the 1973 Session, during a discussion of the future work programme, the consensus was that: 'The question of recognition of States and governments should be set aside for the time being, for although it had legal consequences, it raised many political problems which did not lend themselves to regulation by law': *I.L.C. Yearbook*, 1973–I, p. 175 (Bilge); also p. 164 (Castañeda); but cf. pp. 165, 170 (Tsuruoka).

<sup>4</sup> Higgins, *Development*, pp. 11–14.

<sup>5</sup> Cf. Weissberg, *International Status of the United Nations* (1961), pp. 193–4.

<sup>6</sup> *Supra*, pp. 97–103.



interests of a thorough-going functionalism. Such views are of value as a reaction against absolutist notions of statehood and sovereignty,<sup>1</sup> but statehood does appear to be a term of art in international law; though of course, like all legal, and especially international legal, concepts it is one of open texture. The following exclusive and general legal characteristics of States may be instanced.

1. In principle States have plenary competence to perform acts, make treaties and so on, in the international sphere: this is one meaning of the term 'sovereign' as applied to States.

2. In principle States are exclusively competent with respect to their internal affairs, a principle reflected by Article 2, paragraph 7 of the United Nations Charter. This does not of course mean that they are omnicompetent, in international law, with respect to those affairs: it does mean that their jurisdiction is *prima facie* both plenary and not subject to the control of other States.

3. In principle States are not subject to compulsory international process, jurisdiction or settlement, unless they consent, either in specific cases or generally, to such exercise.<sup>2</sup>

4. States are regarded in international law as 'equal', a principle also recognized by the Charter (Article 2 (1)). This is in part a restatement of the foregoing principles, but it may have certain other corollaries.<sup>3</sup> It is a formal, not a moral or political, principle. It does not mean, for example, that all States are entitled to an equal vote in international organizations,<sup>4</sup> merely that, in any international organization not based on equality, the consent of all the Members to the derogation from equality is required.

5. Finally, any derogations from these principles must be clearly established: in case of doubt an international court or tribunal will decide in favour of the freedom of action of States, whether with respect to external<sup>5</sup> or internal affairs,<sup>6</sup> or as not having consented to a specific exercise of international jurisdiction,<sup>7</sup> or to a particular derogation from equality.<sup>8</sup> This presumption—which is of course rebuttable in any given case—provides a useful indication as to the status of the entity in whose favour it is invoked. It will be referred to throughout this study as the *Lotus* presumption—its classic formulation being the judgment of the Permanent Court in *The Lotus*.<sup>9</sup>

<sup>1</sup> Cf. Higgins, *Development*, pp. 11–17, 42–5, 54–7; Riphagen, *Netherlands Yearbook of International Law*, 6 (1975), pp. 121–65.

<sup>2</sup> *Monetary Gold Removed from Rome in 1943*, *I.C.J. Reports*, 1954, p. 19; *Western Sahara case*, *I.C.J. Reports*, 1975, p. 12 at p. 33.

<sup>3</sup> See Dickinson, *The Equality of States in Public International Law* (1920); the notion of equality of States is not historically a deduction from sovereignty, however: *ibid.*, pp. 56, 334–6.

<sup>4</sup> Cf. Brierly, *The Law of Nations* (6th edn., 1963), pp. 130–3.

<sup>5</sup> *The Lotus*, *P.C.I.J.*, Series A, No. 10 (1927) at p. 18; though, of course, in external affairs the strength of the presumption is less, since it must be weighed against the equal rights of other States.

<sup>6</sup> *Polish War Vessels in the Port of Danzig*, *P.C.I.J.*, Series A/B, No. 43 (1931) at p. 142.

<sup>7</sup> *Eastern Carelia opinion*, *P.C.I.J.*, Series B, No. 5 (1923) at pp. 27–9.

<sup>8</sup> *Interpretation of Peace Treaties (Second Phase)*, *I.C.J. Reports*, 1950, p. 221, at pp. 228–9.

<sup>9</sup> *P.C.I.J.*, Series A, No. 10 (1927), at p. 18. The cogency of the *Lotus* presumption in modern law has been doubted: see, e.g., Brownlie, *Principles*, p. 609. It was referred to with approval by the Permanent Court in its Order of 6 December 1930 in the *Free Zones case*, *P.C.I.J.*, Series A, No. 24 at pp. 11–12. But it was not applied by the Court in cases involving the consti-

These five principles, it is submitted, constitute in legal terms the hard core of the concept of statehood, the essence of the special position in customary international law of States. It follows from this, as a rule of interpretation, that the term 'State' in any document *prima facie* refers to States having these attributes: but this is of course subject to the context. Courts will tend towards strictness of interpretation of the term 'State' if the context predicates plenitude of functions—as for example in Article 4 (1) of the United Nations Charter. Conversely, if a treaty or other document is concerned with a specific issue, then 'State' may be construed liberally—that is, to mean 'State for the specific purpose' of the treaty or document.

This list of five principles appears nominal: but it would seem difficult to add more substantive candidates. Thus the possession of a nationality is not conclusive for statehood.<sup>1</sup> Nor is the fact that an entity is governed by international law conclusive: all subjects of international law are so governed.<sup>2</sup> The rule embodied in Article 2 (4) of the Charter, enjoining the use of force by States except in certain cases, applies also to certain non-State entities.<sup>3</sup> That an entity is responsible for its external affairs (even if it does not itself conduct them) is not conclusive, since non-States may also be responsible for international wrongs.<sup>4</sup> On the other hand that an entity is not internationally responsible for its acts is probably conclusive against its being a State,<sup>5</sup> though which of two entities is responsible in a situation of divided competences is often a question of great difficulty. And it is sometimes said that States only are competent to develop or change customary international law.<sup>6</sup> Even if true, this is

tutions of international organizations, when a relatively extensive interpretation was adopted: see *Competence of the I.L.O. with respect to agricultural labour*, Series B, Nos. 2-3 (1922), at pp. 23-6; *Competence of the I.L.O. to regulate, incidentally, the work of the employer*, Series B, No. 13 (1926), at pp. 21-3; *Jurisdiction of the European Commission of the Danube*, Series B, No. 14 (1927), at pp. 36, 63-4; *contra* Judge Negulesco (diss.) at pp. 104-5. And cf. *Territorial Jurisdiction of the Oder Commission*, Series A, No. 23 (1929), at p. 26. Like most of the so-called 'rules of interpretation' the *Lotus* presumption found no place in the Vienna Convention on the Law of Treaties: A/CONF. 39/27, 23 May 1969, and Corr., 1, Arts. 31-3. It was not applied by the majority in the *Admissions* case, *I.C.J. Reports*, 1948, p. 63; cf. dissenting opinion (Judges Basdevant, Winiarski, McNair, Read), at p. 86, referring to it as 'a rule of interpretation frequently applied by the Permanent Court'. It was applied by the majority in the *Asylum* case, *I.C.J. Reports*, 1950, p. 266, at p. 275. See also Lauterpacht, this *Year Book*, 26 (1949), pp. 48-85; Delupis, *International Law and the Independent State* (1974), pp. 23-5.

<sup>1</sup> Andorra, which may not be a State, none the less has its own nationality: Bélinguier, *La condition juridique des Vallées d'Andorre* (1970), pp. 206-21, esp. at 221; Ourliac, in *Mélanges Maury* (1960), vol. 1, pp. 403-15.

<sup>2</sup> On the notion of 'subjects' of international law see Lauterpacht, *Law Quarterly Review*, 63 (1947), pp. 438-560; *ibid.*, 64 (1948), pp. 97-119; O'Connell, *Revue générale de droit international public*, 67 (1963), pp. 3-43.

<sup>3</sup> Brownlie, *International Law and the Use of Force by States* (1963), pp. 380-1; Higgins, *Development*, pp. 221-2.

<sup>4</sup> This is probably the case with the United Nations: Weissberg, *International Status of the United Nations*, p. 209.

<sup>5</sup> Cf. Waldock: 'a distinction must be made between the conduct of international relations, and responsibility for international relations. The latter phrase has always been used in connection with dependent territories in the past, and was the best short definition possible': *I.L.C. Yearbook*, 1972-I, p. 271; and for discussion of this formula, *ibid.*, 1974-II (1), pp. 26-8.

<sup>6</sup> *Nanni v. Pace and the Sovereign Order of Malta* (1935), *Annual Digest*, 8 (1935-7), No. 2.



unhelpful as a criterion because it is not equally (or at all) true of all States. Other examples could be given.

If there is then a legal concept of statehood, it follows that the law must find some means of determining which entities are 'States', with the above attributes; in other words, of determining the criteria for statehood. It is with this that we are here concerned.

Two preliminary points should, however, be made. First, upon examination the exclusive attributes of States listed above are found not to prescribe specific rights, powers or liberties which all States must, to be States, possess: rather they are presumptions as to the existence of such rights, powers or liberties, rules that these exist unless otherwise provided for. This must be so, since the actual powers, rights and liberties of particular States vary considerably. The legal consequences of statehood are thus seen to be—paradoxically—matters of evidence, or rather of presumption. Predicated on a basic or 'structural' independence,<sup>1</sup> statehood does not involve any necessary substantive rights. Equally the law recognizes no general duty on a State to maintain that independence: independence is protected while it exists, but there is no prohibition on its partial or permanent alienation.<sup>2</sup> The legal concept of statehood provides a measure for determining whether in a given case rights have been acquired or lost.

Secondly, the criteria for statehood are rather special rules, in that their application conditions the application of most other international law rules. As a result, existing States have sometimes tended to assert more or less complete freedom of action with regard to new States.<sup>3</sup> This may explain the reluctance of the International Law Commission to frame comprehensive definitions of statehood when engaged on other work—albeit work which assumed that the category 'States' is certain or ascertainable.<sup>4</sup> It follows that, at the empirical level, the question must again be asked: whether, given the existence of international law rules determining what are 'States', those rules are sufficiently certain to be applied in specific cases, or else have been kept so uncertain or open to interpretation as not to constitute rules at all. And this question is independent of the point—which is accepted—that States may on occasions treat as a State an entity which does not come within the accepted definition of the term.<sup>5</sup> The question is rather: can States legitimately refuse, under cover of the 'open texture' of rules, to treat entities as States which do in fact qualify? Preventing that is the point of having—if in fact we do have—'objective' criteria for statehood.

<sup>1</sup> For the concept of independence see *post*, pp. 119–39.

<sup>2</sup> Cf. Judge Anzilotti, separate opinion, *Austro-German Customs Union* case, *P.C.I.J.*, Series A/B, No. 41 (1931), at p. 59.

<sup>3</sup> e.g., U.S. Ambassador Austin, cited by Brown, *American Journal of International Law*, 42 (1948), p. 621 (on the U.S. recognition of Israel). But it is interesting that State Department advice was opposed to the instantaneous recognition in that case: Snetsinger, *Truman, the Jewish Vote and the Creation of Israel* (1974), pp. 108–9, 181.

<sup>4</sup> *Supra*, p. 107 n. 3.

<sup>5</sup> But cf. Higgins, *Development*, p. 41 n. 69; Marek, *Identity and Continuity*, p. 145, both of whom are too unqualified in their support of the 'declaratory' theory.



#### 4. THE CRITERIA FOR STATEHOOD AND THE PRINCIPLE OF EFFECTIVENESS

The best known formulation of the basic criteria for statehood is that laid down in Article 1 of the Montevideo Convention, 1933:

The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States.<sup>1</sup>

It is a characteristic of these criteria—and of the others to be examined in this section—that they are based on the principle of effectiveness among territorial units. In contrast, certain modern criteria to be examined in the next section either supplement or in certain cases contradict this principle. But they operate only in rather exceptional cases: the accepted criteria must first be dealt with.

##### 1. DEFINED TERRITORY

It is evident that States are territorial entities. 'Territorial sovereignty . . . involves the exclusive right to display the activities of a State.'<sup>2</sup> Conversely, the right to be a State is dependent at least in the first instance upon the exercise of full governmental powers with respect to some area of territory. But, although a State must possess some territory, there appears to be no rule prescribing the minimum area of that territory. States may thus occupy an extremely small area, provided they are independent in the sense to be explained. Monaco and Nauru, for example, are respectively only 1.5 and 21 square kilometres in area.<sup>3</sup> The relationship between statehood and territorial sovereignty thus appears to be of a special kind—a point which the traditional law failed to emphasize, since it concentrated on problems of acquisition of territory by already existing States, on the view that territorial sovereignty was analogous to the ownership of land by natural persons. That analogy was of limited value even in those situations, and in the case of acquisition of territory by new

<sup>1</sup> *League of Nations Treaty Series*, vol. 165, p. 19. The American Law Institute's *Restatement (2nd)*, *Foreign Relations Law of the United States* (1965), § 4, defines 'state' as . . . 'an entity that has a defined territory and population under the control of a government and that engages in foreign relations.' Fitzmaurice, as I.L.C. Rapporteur on the Law of Treaties, included in an early draft the following 'related definition': 'For the purposes of the present Code (a) In addition to the case of entities recognized as being States on special grounds, the term "State" (i) means an entity consisting of a people inhabiting a defined territory, under an organized system of government, and having the capacity to enter into international relations binding the entity as such, either directly or through some other State; but this is without prejudice to the question of the methods by, or channel through which a treaty on behalf of any given State must be negotiated—depending on its status and international affiliations; (ii) includes the government of the State . . .' (Art. 3, *I.L.C. Yearbook*, 1956-II, p. 107). The definition was deleted from the Draft Articles: cf. *ibid.*, 1966-II, pp. 178-92. Cf. Crane, *The State in Constitutional and International Law* (1907), p. 65; Kelsen, *Revue de droit international*, 4 (1929), p. 613 at p. 614.

<sup>2</sup> *Island of Palmas* arbitration (1928), *Reports of International Arbitral Awards*, vol. 2, p. 829 at p. 839 (Judge Huber).

<sup>3</sup> For the Vatican (0.4 km.) see *post*, p. 114 n. 5; generally see Mendelson, *International and Comparative Law Quarterly*, 21 (1972), p. 609 at pp. 610-17; Verhoeven, *Reconnaissance*, p. 54.

States it was positively misleading.<sup>1</sup> It is enough to say here that the category 'statehood' probably takes priority over the category 'acquisition of territory': in other words, that the establishment of a new State on certain territory defeats claims by other States which relate to the whole of the territory so occupied; and where the claims relate to part only of the territory, makes them dependent for settlement on the consent of the new State.<sup>2</sup>

It is suggested then that a State may exist despite claims to its territory, just as an existing State continues despite such claims.<sup>3</sup> Two different situations may be distinguished: claims relating to the entire territory of a new State; and those relating only to the boundaries of the State. In particular cases the two types of claim may co-exist. This was so with Israel in 1948: it was argued that General Assembly Resolution 181 (II) of 29 November 1947 in some way conferred territory on the new State, so that the case was merely one of undefined frontiers, but the other view is tenable. In any case, Israel was admitted to the United Nations on 11 May 1949,<sup>4</sup> it seems on the former supposition. Jessup, when he argued for Israel's admission on behalf of the United States, discussed the requirement of territory in the following terms:

One does not find in the general classic treatment of this subject any insistence that the territory of a State must be exactly fixed by definite frontiers . . . The formulae in the classic treatises somewhat vary, . . . but both reason and history demonstrate that the concept of territory does not necessarily include precise delimitation of the boundaries of that territory. The reason for the rule that one of the necessary attributes of a State is that it shall possess territory is that one cannot contemplate a State as a kind of disembodied spirit . . . [T]here must be some portion of the earth's surface which its people inhabit and over which its Government exercises authority. No one can deny that the State of Israel responds to this requirement . . .<sup>5</sup>

Claims to the entire territory of a State have commonly been raised in the context of admission to the United Nations: this was the case with Israel, and also with Kuwait and Mauritania.<sup>6</sup> The proposition that a State exists despite claims to the whole of its territory was not challenged in these cases.

<sup>1</sup> Cf. Jennings, *The Acquisition of Territory in International Law* (1963), pp. 7-11.

<sup>2</sup> Ibid., p. 38. To the same effect see the *consultation* of MM. Basdevant, Jèze and Politis on the creation of Czechoslovakia: *P.C.I.J.*, Series C, No. 68, pp. 51-3, 58-9. The case was not proceeded with.

<sup>3</sup> The point was assumed by the Permanent Court in two cases: *Monastery at St. Naoum (Albanian Frontier)*, Series B, No. 9 (1924); *Polish-Czechoslovakian Frontier (Question of Jaworzina)*, Series B, No. 8 (1923). But cf. the stricter view proposed in the British Memorial in the *Case Concerning Interpretation of the Treaty of Lausanne*, Series C, No. 10 at pp. 202-3. There is no reference to the matter in the judgment: Series B, No. 12 (1925).

<sup>4</sup> G.A. Res. 273 (III) (37-12: 9); S.C. Res. 70, 4 March 1949 (9-1 (Egypt): 1 (U.K.)).

<sup>5</sup> *Security Council, Official Records*, 383rd Meeting, 2 December 1948, p. 41. See further Alexander, *International Law Quarterly*, 4 (1951), pp. 423-30; Halderman, *Law and Contemporary Problems*, 33 (1968), pp. 78-96; and the works cited *supra*, p. 93 n. 4.

<sup>6</sup> On Kuwait see Al Baharna, *The Legal Status of the Arabian Gulf States* (1968), pp. 250-8; Hassouna, *The League of Arab States and Regional Disputes* (1975), pp. 91-140. On Mauritania see Higgins, *Development*, pp. 18-19, 307. For the Iranian claim to Bahrain see Tadjbakhche, *La question des Îles Bahrein* (1960); Adamiyat, *Bahrain Islands. A Legal and Diplomatic Study of the British-Iranian Controversy* (1955); and Al Baharna, *op. cit.*, pp. 31-5. For the settlement of the dispute see Al Baharna, *International and Comparative Law Quarterly*, 22 (1973), pp. 541-52.



In any event, customary international law prohibits the settlement of territorial disputes between States by the threat or use of force, and a State for the purpose of this rule means any entity established as a State in a given territory, whether or not that territory formerly belonged to or is claimed by another State.<sup>1</sup>

It is only to be expected then that claims to less than the entire territory of a new State and, in particular, boundary disputes, do not affect statehood. A German-Polish Mixed Arbitral Tribunal stated the rule succinctly:

Whatever may be the importance of the delimitation of boundaries, one cannot go so far as to maintain that as long as this delimitation has not been legally effected the State in question cannot be considered as having any territory whatever . . . In order to say that a State exists . . . it is enough that this territory has a sufficient consistency, even though its boundaries have not yet been accurately delimited, and that the State actually exercises independent public authority over that territory.<sup>2</sup>

And the International Court in the *North Sea Continental Shelf* cases confirmed the rule as it were *en passant*:

The appurtenance of a given area, considered as an entity, in no way governs the precise delimitation of its boundaries, any more than uncertainty as to boundaries can affect territorial rights. There is for instance no rule that the land frontiers of a State must be fully delimited and defined, and often in various places and for long periods they are not, as is shown by the case of the entry of Albania into the League of Nations.<sup>3</sup>

The question is whether there are any exceptions to this rule which are not better referred to defects of government or independence. Higgins asserts that, when the doubts as to the future frontiers [are] of a serious nature, statehood [becomes] in doubt. Thus when in 1919 Estonia and Latvia were recognized by the Allied Powers, no recognition was granted to Lithuania on the express ground that owing to the Vilna dispute, its frontiers were not yet fixed.<sup>4</sup>

In view of what has been said, this may be doubted: in any event the specific example given, that of Lithuania, is not such a case. It is true that *de jure* recognition of Lithuania by the Allies was refused because of the Vilna dispute,<sup>5</sup> but this action appears to have been politically motivated; it was not an expression of an Allied view that Lithuania was not a State. The British Under-Secretary of State for Foreign Affairs had previously admitted that the Polish occupation of Vilna (Wilno) was an occupation 'of Lithuanian territory',<sup>6</sup> and as late as 1920 the Prime Minister agreed that the same considerations applied to the *de jure* recognition of Lithuania as to Latvia and Estonia.<sup>7</sup> The

<sup>1</sup> Cf. *supra*, p. 109 n. 3.

<sup>2</sup> *Deutsche Continental Gas-Gesellschaft v. Polish State* (1929), *Annual Digest*, 5 (1929-30), No. 5, at pp. 14-15.

<sup>3</sup> *I.C.J. Reports*, 1969, p. 3, at p. 32.

<sup>4</sup> Higgins, *Development*, p. 20 n.

<sup>5</sup> *Hansard*, H.C. Deb., vol. 139, col. 2207 (21 March 1921).

<sup>6</sup> *Ibid.*, vol. 116, col. 1201 (28 May 1919).

<sup>7</sup> *Ibid.*, vol. 129, col. 240 (11 May 1920).



merits of the Vilna dispute appear to have been very decidedly in favour of Lithuania,<sup>1</sup> and the Allied actions to have been based more on the desire for a strong Poland than appreciation of those merits.<sup>2</sup> However that may be, it is clear that Lithuania and the other so-called 'Border States' were independent States by mid-1919, despite then-existent or subsequent territorial claims. Arbitrator Reichmann in *Germany v. Reparations Commission* held that:

Le Gouvernement lithuanien a été reconnu *de facto* en septembre 1919, mais il existait comme Gouvernement indépendant déjà lors de la signature du Traité de Versailles . . .<sup>3</sup>

Lithuania was thus not included in the territory of 'Russia' within the meaning of Article 260 of the Treaty at the time it was signed (28 June 1919). And the same opinion was evidently held, though it was not directly in point in either case, by the Permanent Court in two cases concerning Lithuania.<sup>4</sup>

It appears then that even a substantial boundary or territorial dispute with a new State is not enough to bring statehood into question. The only requirement is that the State must consist of a certain coherent territory effectively governed.

## 2. PERMANENT POPULATION

If States are territorial entities, they are also aggregates of individuals. A permanent population is thus necessary for statehood, though, as in the case of territory, no minimum limit is apparently prescribed. For example in 1973 the estimated population of Nauru was only 6,500; that of San Marino was 20,000. Of putative States with very small populations, only the Vatican City may be challengeable on this ground, and this as much because of the professional and non-permanent nature of its population as because of its size.<sup>5</sup>

The rule under discussion requires States to have a permanent population: it is not a rule relating to the nationality of that population. It appears that the grant of nationality is a matter which only States by their municipal law (or by way of treaty) can perform.<sup>6</sup> Nationality is thus dependent upon statehood, not the reverse. Whether the creation of a new State on the territory of another results in statelessness of the nationals of the previous State there resident,<sup>7</sup>

<sup>1</sup> Lapradelle, le Fur, Mandelstam, *The Vilna Question* (1929); Langer, *Seizure of Territory* (1947), pp. 22-5; Scelle, *Revue générale de droit international public*, 35 (1928), pp. 730-80; Brockelbank, *American Journal of International Law*, 20 (1926), pp. 483-501.

<sup>2</sup> Cf. Judge Anzilotti, *Railway Traffic between Lithuania and Poland*, *P.C.I.J.*, Series A/B, No. 62 (1931), at p. 123.

<sup>3</sup> *Reports of International Arbitral Awards*, vol. 1, p. 524 at p. 525 (13th Question) (1924).

<sup>4</sup> In the *Railway Traffic* case, *P.C.I.J.*, Series A/B, No. 42 (1931), at p. 112, the Court thought the establishment of Lithuania antedated the seizure of Vilna on 9 October 1920. See also *Panevezys-Saldutiskis Railway* case, *P.C.I.J.*, Series A/B, No. 76 (1939), p. 10.

<sup>5</sup> Mendelson, *International and Comparative Law Quarterly*, 21 (1972), p. 609 at pp. 611-12; Rousseau, *Revue générale de droit international public*, 37 (1930), pp. 145-53; but cf. Kunz, *American Journal of International Law*, 46 (1952), pp. 308-14.

<sup>6</sup> *Nottebohm* case (*Second Phase*), *I.C.J. Reports*, 1955, p. 4, at p. 23.

<sup>7</sup> Cf. the Israeli cases in the period (1948-52) when there was no Israeli nationality law: *I.L.R.*, 17 (1950), pp. 110-12. See also *Naqara v. Minister of the Interior*, *I.L.R.*, 20 (1953), p. 49.

or an automatic change in nationality,<sup>1</sup> or in retention of the previous nationality until provision is otherwise made by treaty or the law of the new State<sup>2</sup> is a matter of some doubt. The problem is made more difficult because of the confusion prevalent between 'international nationality' (i.e. nationality under the 'effective link' doctrine) and municipal nationality. Persons could very well be regarded as nationals of a particular State for international purposes before the State concerned had established rules for granting or determining its (municipal) nationality. On the other hand, apart from treaty a new State is not obliged to extend its nationality to *all* persons resident in its territory. Two views of the matter may be contrasted:

. . . in view of the rule that every State must have a determinate population (as an element of its statehood), and therefore nationality always has an international aspect, there is no very fundamental distinction between the issue of statehood and that of transfer of territory . . . [T]he evidence is overwhelmingly in support of the view that the population follows the change of sovereignty in matters of nationality.<sup>3</sup>

Although inhabitants of territory ceded by or seceding from the Crown lose their British nationality, it does not follow that they acquire either automatically or by submission that of the successor State. The latter may withhold the granting of its nationality to all or portions of the persons concerned . . . Undesirable as it may be that any persons become stateless as a result of a change of sovereignty, it cannot be asserted with any measure of confidence that international law, at least in its present stage of development, imposes any duty on the successor State to grant nationality.<sup>4</sup>

A tentative reconciliation may be suggested: in the absence of provision to the contrary, persons habitually resident in the territory of the new State automatically acquire the nationality of that State, for all international purposes, and lose their former nationality, but this is subject to a right in the new State to delimit more particularly which persons it will regard as its nationals. This view is at least consistent with the judgment of the Permanent Court in the *Case Concerning Acquisition of Polish Nationality*:

the Minorities Treaties in general, and the Polish Treaty in particular, have been concluded with new States, or with States which, as a result of the war, have had their territories considerably enlarged, and whose population was not therefore clearly defined from the standpoint of political allegiance. One of the first problems which presented itself in connection with the protection of the minorities was that of preventing these States from refusing their nationality, on racial, religious or linguistic

<sup>1</sup> *A.B. v. M.B.*, I.L.R., 17 (1950), p. 110, referring to the 'absurd result of a State without nationals'; Draft Convention of Harvard Law Research, Art. 18 (2); *Wildermann v. Stinnes*, *Annual Digest*, 2 (1923-4), No. 120; *Poznanski v. Lentz & Hirschfeld*, *Recueil des Tribunaux Arbitraux Mixtes*, 4 (1925), p. 353.

<sup>2</sup> *Date of Entry into Force of Versailles Treaty (Germany)* case, I.L.R., vol. 32, p. 339 (1961); Weis, *Nationality and Statelessness in International Law* (1956), pp. 151 ff.

<sup>3</sup> Brownlie, this *Year Book*, 39 (1963), pp. 284-364, at p. 320.

<sup>4</sup> O'Connell, *State Succession in Municipal Law and International Law* (1967), vol. 1, pp. 497-528 at p. 503.



grounds, to certain categories of persons, in spite of the link which effectively attached them to the territory allocated to one or other of these States<sup>1</sup>.

### 3. GOVERNMENT

The requirement that a putative State have an effective government might be regarded as central to its claim for statehood. 'Government' or 'effective government' is obviously a basis for the other central requirement of independence.<sup>2</sup> Moreover, international law defines 'territory' not by adopting private law analogies of real property, but by reference to the extent of governmental power exercised, or capable of being exercised, with respect to some area and population. Territorial sovereignty is not ownership of, but governing power with respect to, territory. There is thus a strong case for regarding government as the central criterion of statehood, since all the others depend upon it. The difficulty is, however, that the legal criteria for statehood are of necessity nominal and exclusionary: that is to say, their concern is not with the central, clear cases but with the borderline ones. Hence the application of the criterion of government in practice is much less simple than the above analysis might suggest.

A striking modern illustration is that of the former Belgian Congo, granted a hurried independence in 1960 as the Republic of the Congo (now Zaïre). The situation in the Congo after independence has been described elsewhere.<sup>3</sup> No effective preparations had been made; the new government was bankrupt, divided, and in practice hardly able to control even the capital. Belgian and other troops intervened, shortly after independence, under claim of humanitarian intervention; and extensive United Nations financial and military assistance became necessary almost immediately.<sup>4</sup> Among the tasks of the United Nations force was, or came to be, to suppress the secession in Katanga, the richest Congolese province.<sup>5</sup> Anything less like effective government it would be hard to imagine.

<sup>1</sup> *P.C.I.J.*, Series B, No. 7 (1923), at p. 15. Cf. also *Nationality (Secession of Austria)* case, I.L.R., 21 (1954), p. 175; *Murray v. Parkes*, [1942] 2 K.B. 123; Graupner, *Transactions of the Grotius Society*, 32 (1946), pp. 87-120.

<sup>2</sup> It is clear that 'government' and 'independence' are closely related as criteria—indeed, they may be regarded as different aspects of the requirement of separate and effective control. For present purposes, government is treated as the exercise of authority with respect to persons and property within the territory claimed; whereas independence is treated as the exercise, or the right to exercise, such authority with respect to other international persons, whether within or outside the territory claimed. Other writers draw a similar distinction but in different terms: for example Wheaton, *supra*, p. 97 n. 6 ('internal' and 'external' sovereignty); Kamanda, *Legal Status of Protectorates*, pp. 175-82 ('sovereignty' (internal) and 'independence' (external)).

<sup>3</sup> Kanza, *Conflict in the Congo* (1972), p. 192; Barraclough (ed.), *Survey of International Affairs 1959-60* (1961), pp. 396-436; Hoskyns, *The Congo since Independence* (1965); Higgins, *Development*, pp. 162-4.

<sup>4</sup> See, e.g., the U.N.-Congolese Agreement on Financial Assistance, 23 August 1960: *United Nations Treaty Series*, vol. 373, p. 327, providing \$5 million to finance normal imports (Art. 4) and 'to meet its current budgetary needs, preference being given to the government pay-roll and emergency relief expenditure' (Art. 7). Cf. Said, *De Léopoldville à Kinshasa. Le situation économique au Congo ex-Belge au jour de l'indépendance* (Neuchâtel, 1969).

<sup>5</sup> On the Katangan secession see also Lemarchand, *American Political Science Review*, 56 (1962), pp. 404-16; O'Brien, *To Katanga and Back: A U.N. Case History* (1962).



Yet despite this there can be little doubt that the Congo was in 1960 a State in the full sense of the term. It was widely recognized. Its application for United Nations membership was approved without dissent.<sup>1</sup> United Nations action subsequent to admission was of course based on the 'sovereign rights of the Republic of the Congo'.<sup>2</sup> On no other basis could the attempted secession of the Katanga province have been condemned as 'illegal'.<sup>3</sup>

What then is to be made of the criterion of 'effective government'? Three views can be taken of the Congo situation in that regard. It may be that international recognition of the Congo was simply premature or wrongful, because, not possessing an effective government, the Congo was not a State.<sup>4</sup> It may be that the recognition of the Congo was a case where an entity not properly qualified as a State is treated as such by other States, for whatever reason; that is, a case of constitutive recognition. Alternatively, it may be that the requirement of 'government' is less stringent than has been thought, at least in particular contexts. The last view, it will be argued, is to be preferred.<sup>5</sup>

The point about 'government' is that it has two aspects: the actual exercise of authority, and the right or title to exercise that authority. Prior to 1960 Belgium had that right, which it transferred to the new entity. Of course the Congo could thereafter have disintegrated; none the less, by granting independence, Belgium estopped itself from denying the consequences of that independence. There was thus no international person as against whom recognition of the Congo could be illegal. *Prima facie* a new State granted full formal independence by a former sovereign has the international right to govern its territory:<sup>6</sup> hence the United Nations action in support of that right. On the other hand, in the revolutionary situation no such estoppel exists and (in general<sup>7</sup>) statehood can only be obtained by effective and stable exercise of governmental powers.<sup>8</sup> Although acquisition of territory does not provide an exact analogy, the difference is the same as between cession and prescription.

The position of Finland in 1917-18 provides a good example of the latter situation. Finland had been an autonomous part of the Russian Empire from 1807; it declared its independence after the November Revolution. Its territory was thereafter subject to a series of military actions and interventions, and it was not until after the defeat of Germany by the Entente and the removal of Russian troops from Finnish territory by Sweden that some degree of order was restored. In those circumstances it was not surprising that the Commission

<sup>1</sup> S.C. Res. 142, 7 July 1960; G.A. Res. 1480 (XV), 20 September 1960.

<sup>2</sup> Cf. G.A. Res. 1974 (ES-IV), 20 September 1960 (70-0: 11), para. 6.

<sup>3</sup> S.C. Res. 169, 24 November 1961 (9-0: 2).

<sup>4</sup> This was, it seems, the older view: Baty, *American Journal of International Law*, 28 (1934), pp. 444-5. Higgins describes the Congo's U.N. admission as a derogation from 'the fairly distinct pattern of consistent adherence to the requirement of a stable and effective government': *Development*, pp. 21-2.

<sup>5</sup> Cf. the position in Cyprus at various stages after 1960: *A.G. v. Ibrahim*, I.L.R., vol. 48, p. 6 (1964); and the cases of Ruanda and Burundi, discussed by Higgins, *Development*, pp. 22-3.

<sup>6</sup> See further *post*, pp. 134-7.

<sup>7</sup> For a possible qualification see *post*, pp. 161-2.

<sup>8</sup> For the test of independence in cases of secession see *post*, pp. 137-8.

of Jurists appointed by the League to report on certain aspects of the *Aaland Islands* dispute were of opinion that,

for a considerable time, the conditions required for the formation of a sovereign State did not exist. In the midst of revolution and anarchy, certain elements essential to the existence of a State, even some elements of fact, were lacking for a fairly considerable period. Political and social life was disorganized; the authorities were not strong enough to assert themselves; civil war was rife; further, the Diet, the legality of which had been disputed by a large section of the people, had been dispersed by the revolutionary party, and the Government had been chased from the capital and forcibly prevented from carrying out its duties; the armed camps and the police were divided into two opposing forces, and Russian troops, and after a time Germans also, took part in the civil war . . . It is therefore difficult to say at what exact date the Finnish Republic, in the legal sense of the term, actually became a definitely constituted sovereign State. This certainly did not take place until a stable political organization had been created, and until the public authorities had become strong enough to assert themselves throughout the territories of the State without the assistance of foreign troops. It would appear that it was in May 1918, that the civil war was ended and that the foreign troops began to leave the country, so that from that time onwards it was possible to re-establish order and normal political and social life, little by little.<sup>1</sup>

The test applied, with comparative strictness, by the Jurists may be taken accurately to state the requirement of government in a secessionary situation. The Commission of Rapporteurs, on the other hand, disagreed with the Jurists on this point, because of the importance they attached to Soviet recognition of Finland,<sup>2</sup> and, more particularly, because of Finland's continuity of personality before and after 1917. They therefore applied rules relating to the restoration of law and order in Finnish territory, and to the legality of foreign assistance for that purpose,<sup>3</sup> rather than the stricter rules relating to the creation *ab initio* of stable government in a new State.<sup>4</sup>

The requirement of government thus has the following legal effects. Negatively, the lack of a coherent form of government in a given territory militates against that territory being a State, in the absence of other factors, such as the grant of independence to that territory by a former sovereign. The continued absence of a government will tend to the dissolution of any State in that area. Certain, particularly nomadic, tribes do not have government in the sense required and so are not States, though they may have a more limited legal personality.<sup>5</sup> Positively, the existence of a system of government in, and referable to, a specific territory indicates without more a certain legal status, and is in general a pre-

<sup>1</sup> *League of Nations Official Journal*, Special Supplement No. 4 (1920), pp. 8-9.

<sup>2</sup> *League of Nations*, Council Doc. B7 21/68/106 (1921), p. 22.

<sup>3</sup> *Ibid.*, p. 23.

<sup>4</sup> Larnaude and Struycken, two of the Commission of Jurists, later reaffirmed their view before the Council: *League of Nations Official Journal*, September 1921, p. 697. Huber was absent and could not give an opinion.

<sup>5</sup> Cf. the status of the nomadic tribes of the Western Sahara in 1884-5: *Western Sahara* opinion, *I.C.J. Reports*, 1975, p. 12 at pp. 39 (majority opinion), 85-7 (Judge Ammoun), 75 (Judge Gros), 124 (Judge Dillard), 171 (de Castro).



condition for statehood. Continuity of government in a territory is one factor determining continuity of the State concerned, as well as continuity between different forms of legal personality.<sup>1</sup> And, although the law distinguishes States from their governments, normally only the government of a State can bind that State, for example, by treaty. The existence of a government in a territory is thus a precondition for the normal conduct of international relations.

To summarize, statehood is not 'simply' a factual situation but a legally defined claim of right, specifically to the competence to govern a certain territory. Whether the asserted right exists depends both on the facts and on whether it is disputed. Like other territorial rights, government as a pre-condition for statehood is thus, after a certain point, relative. But it is not entirely so: each State is an original foundation predicated on a certain basic independence. This was represented in the Montevideo formula by 'capacity to enter into relations with other States'.

#### 4. CAPACITY TO ENTER INTO RELATIONS WITH OTHER STATES

Capacity to enter into relations with States is no longer, if it ever was, the exclusive prerogative of States.<sup>2</sup> On the other hand, States pre-eminently possess that capacity; but this is not a criterion, merely a consequence, of statehood, and one which is not constant but depends on the status and situation of particular States.<sup>3</sup> It might still be said that *capacity* to enter into the full range of international relations is a useful criterion.<sup>4</sup> But capacity or competence in this sense depends partly on the power of internal government of a territory, without which international obligations may not be carried into effect, and partly on the entity concerned being separate for the purpose of such relations so that no other entity both carries out and accepts responsibility for them. In other words, capacity to enter into relations with other States, in the sense in which it might be a useful criterion, is a conflation of the requirements of government and independence. To the latter we must now turn.

#### 5. INDEPENDENCE

Independence is the central criterion of statehood.<sup>5</sup> As Judge Huber stated in the *Island of Palmas* case:

Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. The development of the national organization of States during the last few centuries, and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State

<sup>1</sup> See generally Marek, *Identity and Continuity*, *passim* (cf. Gentili, *De Jure Belli* (1612), Bk. I, Ch. 23, §§ 192-3).

<sup>2</sup> *Supra*, p. 109.

<sup>3</sup> *Ibid.*

<sup>4</sup> Cf. Montevideo Convention, *supra*, p. 111 n. 1, Art. 1 (d); *Restatement 2nd, Foreign Relations Law of the United States*, §§ 4, 100 (c).

<sup>5</sup> See Higgins, *Development*, pp. 25-42; Kamanda, *Legal Status of Protectorates*, pp. 188-91; Verzijl, *International Law in Historical Perspective*, vol. 2, pp. 455-90; and works cited *infra*.



in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations.<sup>1</sup>

It must first be said that different legal consequences may be attached to lack of independence in specific cases. Lack of independence can be so complete that the entity concerned is not a State but an internationally indistinguishable part of the dominant State. A grant of 'independence' may, in certain circumstances, be a legal nullity, or even an act engaging the responsibility of the grantor, as with so-called 'puppet States'. Or an entity may be independent in some basic sense but act in a specific matter under the control of another State so that the relationship becomes one of agency, and the responsibility of the latter State is attracted for illegal acts of the former.

Moreover, it must be emphasized that the criterion of independence as the basic element of statehood in international law may operate differently in different contexts. In particular, it is important to distinguish independence as an initial qualification for statehood, and as a criterion for its continued existence.<sup>2</sup> For example, the presumption of continuity of existing legal rights, which may be regarded as a general principle of law, may operate in different directions in the two cases. A new State formed by secession from a metropolitan State will have to demonstrate substantial independence, both formal and real, before it will be regarded as definitively created.<sup>3</sup> On the other hand, the independence of an existing State is protected by international law rules against illegal invasion and annexation, so that the State may, even for a considerable time, continue to exist as a legal entity despite lack of effectiveness.<sup>4</sup> But where a new State is formed by grant of power from the previous sovereign (the situation referred to here as devolution<sup>5</sup>), considerations of pre-existing rights are no longer as relevant and independence is treated as a predominantly formal criterion.<sup>6</sup> These three situations will be referred to in more detail later; first, some more general discussion of the notion of independence is required.

#### (i) 'Independence' and the Austro-German Customs Union case

The different meanings or applications of 'independence', referred to above, are also relevant to an examination of the 'leading case' on independence, the *Austro-German Customs Union* case,<sup>7</sup> which involved the meaning of the term 'independence' in a treaty designed to guarantee the continuance of Austria and its separation from Germany; and the question of the putative loss of independence of an existing State. The Court was asked to advise whether the proposed customs union between Germany and Austria was consistent with

<sup>1</sup> *Reports of International Arbitral Awards*, vol. 2, p. 829 at p. 838 (1928).

<sup>2</sup> There is a further, related, distinction to be drawn between independence as a criterion for statehood, and independence as a right of States. Cf. Whiteman, *Digest*, vol. 5, pp. 88-124.

<sup>3</sup> *Post*, pp. 157-8.

<sup>4</sup> *Post*, p. 165.

<sup>5</sup> O'Connell, *State Succession* (1967), vol. 2, pp. 88, 101, distinguishes 'revolutionary' from 'evolutionary secession'. Cf. also International Law Association, *The Effect of Independence upon Treaties* (1965), p. 1.

<sup>6</sup> Cf. the Congo after 1960: *supra*, pp. 116-17; and for further elaboration see *post*, pp. 134-7.

<sup>7</sup> *P.C.I.J.*, Series A/B, No. 41 (1931).

obligations of Austria under the Treaty of Saint-Germain and the Protocol of Geneva.<sup>1</sup> The judges were unanimous in holding that the proposed regime, based as it was on the equality of the two parties and with provision for withdrawal at twelve months' notice,<sup>2</sup> was not an 'alienation' of independence. Indeed, that proposition could 'scarcely be denied'.<sup>3</sup> But, by eight votes to seven, the Court held the proposed union illegal. The majority opinion, while agreeing that Austria's independence was not 'strictly speaking' endangered within the meaning of Article 88, held that the proposed union was a 'special regime or exclusive advantages calculated to threaten [sc. economic] independence' within the meaning of the Protocol.<sup>4</sup> Judge Anzilotti doubted whether the Protocol could, in any case, legally extend the Treaty, but held the union inconsistent with both Treaty and Protocol.<sup>5</sup> A strong minority held it inconsistent with neither.<sup>6</sup> The case has been subject to the most stringent criticism<sup>7</sup>; moreover it is one of those instances where a majority can be found against each possible *ratio decidendi*. Nevertheless, its importance in our context is much less than has been made out, for several reasons.

For it seems clear that the Protocol, with its emphasis on 'economic independence', asserted an extensive interpretation of Article 88. The Protocol seems to suggest that 'a special regime or exclusive advantages' threatening merely 'economic independence' were prohibited by Article 88, a point the majority expressly denied.<sup>8</sup> Moreover, the various agreements were not concerned with the criteria for statehood but with the preservation of full independence as a (possibly unwelcome) duty incumbent upon Austria for the benefit of general European peace.<sup>9</sup> This point was emphasized in the French submission, and in the oral argument of M. Basdevant,<sup>10</sup> and was implicitly accepted in the majority opinion:

*irrespective of the definition of the independence of States which may be given by legal*

<sup>1</sup> By Art. 88 of the Treaty of St. Germain, 1919, Austria's independence was alienable except with the consent of the League Council; Austria undertook 'to abstain from any act which might directly or indirectly or by any means whatever compromise her independence . . . by participation in the affairs of another Power': *British and Foreign State Papers*, vol. 112, pp. 317, 360. By Protocol No. 1 of 1922, Austria again undertook not to alienate its independence, to abstain from all 'negotiation and from any economic or financial undertaking calculated directly or indirectly to compromise this independence', and not to grant 'to any State whatever a *special régime or exclusive advantages* calculated to threaten this independence': *British and Foreign State Papers*, vol. 116, p. 851 (italics added).

<sup>2</sup> Protocol of Vienna, Arts. XI (3), XII: *British and Foreign State Papers*, vol. 134, p. 991. The proposal was in fact abandoned prior to the Court's judgment.

<sup>3</sup> Majority opinion, *P.C.I.J.*, Series A/B, No. 41 at p. 52; Judge Anzilotti, *ibid.*, at pp. 66-7.

<sup>4</sup> *Ibid.*, p. 52. <sup>5</sup> *Ibid.*, pp. 64, 73. <sup>6</sup> *Ibid.*, pp. 81-7.

<sup>7</sup> Brierly, in Waldock and Lauterpacht (eds.), *The Basis of Obligation in International Law and Other Papers* (1958), pp. 242-9; Morgenthau, *Politics among Nations* (5th edn., 1973), p. 426; Lauterpacht, *The Development of International Law by the International Court* (1958), pp. 47-9.

<sup>8</sup> *P.C.I.J.*, Series A/B, No. 41, p. 52.

<sup>9</sup> *Ibid.*, p. 57 (Judge Anzilotti).

<sup>10</sup> Cf. French submission, *P.C.I.J.*, Series C, No. 53, at p. 128: 'le Traité de Saint-Germain et le protocole de 1922 . . . ont envisagé non la conception théorique de l'indépendance des États, mais l'indépendance de l'Autriche . . . telle qu'elle se comportait en 1919.' Emphasized in oral argument of Basdevant: *ibid.*, pp. 400, 404, 417. Cf. the remarks of M. Kaufmann, *ibid.*, pp. 508-9; Basdevant's reply, pp. 566-7.



*doctrine or may be adopted in particular instances in the practice of States*, the independence of Austria, according to Article 88 of the Treaty of Saint-Germain, must be understood to mean the continued existence of Austria within her present frontiers as a separate State with the sole right of decision in all matters economic, political, financial or other with the result that that independence is violated, as soon as there is any violation thereof, either in the economic, political, or any other field, these different aspects of independence being in practice one and indivisible.<sup>1</sup>

This passage is often cited as a definition of independence, but it must be referred to its specific context. As a general definition of independence as the criterion of statehood it is much too absolute.

The minority opinion differed not so much over the definition of 'independence' for the relevant purposes as over the disputed questions of fact.<sup>2</sup> On the other hand, the definition of independence given by Judge Anzilotti has become the *locus classicus* and deserves quotation at length:

... (T)he independence of Austria within the meaning of Article 88 is nothing else but the existence of Austria, within the frontiers laid down by the Treaty of Saint-Germain, as a separate State and not subject to the authority of any other State or group of States. Independence as thus understood is really no more than the normal condition of States according to international law; it may also be described as sovereignty (*suprema potestas*), or external sovereignty, by which is meant that the State has over it no other authority than that of international law . . .

It follows that the legal conception of independence has nothing to do with a State's subordination to international law or with the numerous and constantly increasing states of *de facto* independence which characterise the relation of one country to other countries. It also follows that the restrictions upon a State's liberty, whether arising out of ordinary international law or contractual engagements, do not as such in the least affect its independence. As long as these restrictions do not place the State under the legal authority of another State, the former remains an independent State however extensive and burdensome those obligations may be.<sup>3</sup>

Two main elements are involved here: the separate existence of an entity within reasonably coherent frontiers; and the fact that the entity is 'not subject to the authority of any other State or group of States', which is to say, that it has over it 'no other authority than that of international law'.<sup>4</sup> 'Separate existence' in this sense would seem to be dependent upon the criteria discussed already; that is, upon the exercise of substantial governmental authority with respect to some territory and people. Where this exists, the area concerned is potentially a 'State-area', but as Judge Anzilotti made clear, some further

<sup>1</sup> *P.C.I.J.*, Series A/B, No. 41, p. 45 (author's italics). Cf. the significantly wider terms of Art. 4 of the Austrian State Treaty, 1955: *United Nations Treaty Series*, vol. 217, p. 225, at p. 229.

<sup>2</sup> They thus gave a purely formal, and unhelpful, definition of independence: 'A State would not be independent in the legal sense if it was placed in a condition of dependence on another Power, if it ceased itself to exercise within its own territory the *summa potestas* or sovereignty, if it lost the right to exercise its own judgment in coming to the decisions which the government of its territory entails' (*P.C.I.J.*, Series A/B, No. 41, p. 77).

<sup>3</sup> *Ibid.*, pp. 57-8. But cf. Anzilotti's view (a denial of any objective rules defining statehood): *op. cit.* (above, p. 107 n. 1).

<sup>4</sup> Cf. Vattel, *Le droit des gens*, Bk. I, Ch. 1, §§ 5-11; sovereignty is 'the right to self-government', so that a people 'under the rule of another' is not a State.



element—the absence of subjection to the authority of another State or States—is necessary. Such a requirement appears to exclude two distinct situations. It may be that an entity, while not formally independent, operates in fact with substantial freedom in both internal and external affairs. This situation arises where formal or nominal claims are made to ‘suzerainty’ or ‘residual sovereignty’, or in a situation where the gradual grant of power from a metropolitan State to a former colony masks the emerging statehood of the latter. Alternatively, it may be that an entity formally independent is in fact under the direction of another State to the extent that its formal independence is nugatory or meaningless. The two situations correspond with an ambiguity in the word ‘authority’ or (in Vattel’s formulation) ‘rule’, which may mean a claim of right, or the actual exercise of power in derogation from such a claim. It is thus necessary to distinguish ‘formal’ from ‘actual’ independence, and to determine their relationship.<sup>1</sup>

(ii) *The distinction between formal and actual independence*

(a) *Formal independence.* Formal independence exists where the powers of government of a territory (both in internal and external affairs) are vested in the separate authorities of the putative State. The vesting of power, in this sense, may be the result of the municipal law in force in the territory concerned, or it may be the result of a grant of full power from the previous sovereign; it may be established, or recognized, by bilateral or multilateral treaty. Formal independence thus involves, in Rousseau’s terminology, ‘*l’exclusivité de la compétence*’.<sup>2</sup> This aspect is best illustrated by examining the factors which have been regarded as relevant to formal independence.

1. *Situations not derogating from formal independence.* The following types of situation are not regarded, in international practice, as derogating from formal independence, although if extended far enough, they may derogate from actual independence.<sup>3</sup>

(i) *Constitutional restrictions upon freedom of action.* The written constitutions of many States contain legally enforceable restrictions on governmental action: these are, of course, entirely consistent with independence. An extreme case was the 1960 Constitution of the Republic of Cyprus.<sup>4</sup> Provided no other State possesses discretionary authority to alter the constitution of the State concerned,<sup>5</sup> the fact that the latter has no power even to change its Constitution is not a derogation from formal independence. Canada only acquired that power (and then with certain exceptions) in 1949, after more than 20 years of

<sup>1</sup> Marek, *Identity and Continuity*, pp. 162–89; Higgins, *Development*, p. 26.

<sup>2</sup> Rousseau, *Recueil des cours*, 73 (1948), pp. 171–253 at p. 220; and his *Droit international public* (1974), vol. 2, pp. 55–93.

<sup>3</sup> Post, p. 126. Cf. Verzijl, *International Law in Historical Perspective*, vol. 2, pp. 455–90.

<sup>4</sup> Cmd. 1903 (1960), pp. 91–172. Cf. *British and Foreign State Papers*, vol. 164, p. 219; Emilianides, in *Mélanges Sfériades* (1961), vol. 2, pp. 629–39; Xydis, *Cyprus, Reluctant Republic* (1973); Higgins, *Development*, pp. 33–4. See also Ehrlich, *Cyprus, 1958–1967* (1974), pp. 7–35.

<sup>5</sup> This seems to have been an objection to Cracow’s independence: Ydit, *Internationalized Territories* (1961), pp. 95–108, at p. 107.

independence.<sup>1</sup> The power referred to is of course municipal legal authority: the people of a State normally have the international competence to change their constitution in violation of previous municipal law,<sup>2</sup> though here again Cyprus is an apparent exception.

(2) *Municipal illegality of the actual government of a State.* It is a further corollary of the rule that revolutions do not affect the continuity of the State, that the municipal illegality of its actual government is not a derogation from formal independence.<sup>3</sup>

(3) *Treaty obligations.* The International Court has frequently confirmed the principle that treaty obligations do not derogate from the formal independence of the States parties. In *The Wimbledon*, which concerned the effects on Germany of the Treaty of Versailles, the Court.

decline(d) to see in the conclusion of any treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right to enter into international engagements is an attribute of State sovereignty.<sup>4</sup>

And this principle was confirmed in a number of other decisions of the Permanent Court.<sup>5</sup>

(4) *The existence of military bases or other territorial concessions (whether under treaty or by reservation in a grant of independence).* Military or other territorial concessions do not, of themselves, constitute a derogation from formal independence. The sometimes extensive territorial concessions granted by the North African States and China nevertheless preserved the formal 'territorial integrity and political independence' of those States.<sup>6</sup> One consequence of continued statehood in such situations seems to be the ability to cancel or avoid such arrangements, whether or not legally.<sup>7</sup>

(5) *The exercise of governmental competence on a basis of agency.* It is clear that the exercise of governmental competence by another international person or persons on behalf of and by delegation from a State is not inconsistent with formal independence. The foreign affairs and defence powers are quite often so delegated; as are certain economic or technical facilities. The important

<sup>1</sup> By the British North America Act (No. 2) 1949, s. 1.

<sup>2</sup> That is, revolutions do not affect the continuity of the State. See Marek, *Identity and Continuity*, pp. 24-73, and works there cited.

<sup>3</sup> See the cases cited by Marek, *op. cit.* (previous note), pp. 38-42.

<sup>4</sup> *P.C.I.J.*, Series A, No. 1 (1920), p. 25. The same argument was raised by Germany, and rejected, prior to signature of the Treaty of Versailles: Temperley, *History of the Peace Conference at Paris* (1920-4), vol. 2, pp. 397, 408.

<sup>5</sup> *Exchange of Greek and Turkish Populations*, *P.C.I.J.*, Series B, No. 10 (1925), p. 21; *Jurisdiction of the European Commission of the Danube*, *P.C.I.J.*, Series B, No. 14 (1927), p. 36; cf. Austrian Memorial in the *Customs Union* case, *P.C.I.J.*, Series C, No. 53, pp. 91-3.

<sup>6</sup> Verzijl, *International Law in Historical Perspective*, vol. 2, pp. 482-8.

<sup>7</sup> Higgins, *Development*, p. 32. On military 'servitudes' generally see *ibid.*, pp. 31-4; Esgain, in O'Brien (ed.), *The New Nations in International Law and Diplomacy* (1965), pp. 42-97; Delupis, *International Law and the Independent State* (1974), pp. 200-23.



element is always that the competence is exercised not independently but in right of the State concerned.

(6) *The possession of joint organs for certain purposes.* The creation of joint organs to carry out certain governmental functions is a quite common feature of international relations. Thus Austria-Hungary possessed joint organs for foreign affairs, defence and currency, but Austria and Hungary arguably remained separate international entities.<sup>1</sup> The operations of the European Communities are not regarded as inconsistent with the independence of the member States.<sup>2</sup>

(7) *Membership of international organizations, even those possessing a degree of coercive authority.* Despite the extensive powers of the Security Council under the Charter, the United Nations 'is based on the principle of the sovereign equality of all its Members'.<sup>3</sup> If United Nations membership preserves independence, *a fortiori* this is true so far of other international organizations, possessing lesser powers.

(8) *The existence of special legal relations between two States as a result of devolution.* Where a State comes into existence by gradual devolution, special relations may well continue to exist between the new and the old State. These may include common citizenship, special provision for immigration, extradition, and such matters, and special defence arrangements. Within certain limits such relations do not prejudice formal independence.<sup>4</sup>

2. *Situations regarded as derogating from formal independence.* Two basic situations may be regarded as derogating from what would otherwise be formal independence, as defined above.<sup>5</sup>

(1) *The existence, as a matter of international law, of a special claim of right, irrespective of consent, to the exercise of governmental powers.* Where a State claims the right to exercise governmental authority over a territory, the formal independence of that territory is in issue. This is an expression of Rousseau's requirement of '*l'exclusivité de la compétence*'.<sup>6</sup> Excluded from the category of

<sup>1</sup> This was the view taken by the Permanent Court in its opinion on the *Delimitation of the Polish-Czechoslovakian Frontier (Question of Jaworzina)*, Series B, No. 8 (1923) at pp. 42-3 (interpretation of the term 'international frontier'). Cf. *Administrative Decision No. 1* (1927), *Reports of International Arbitral Awards*, vol. 6, p. 203 at pp. 209-10 (Commissioner Parker); *Reparations Commission v. German Government* (1924), *Reports of International Arbitral Awards*, vol. 1, pp. 440-1 (Arbitrator Beichmann). Marek, *Identity and Continuity*, pp. 204-7, argues that Austria-Hungary before 1918 was a single international entity.

<sup>2</sup> '[T]he Community is not a State, especially not a federal State, but a *sui generis* community in the process of progressive integration, an "inter-State institution" within the meaning of Article 24 (1) German Constitution': *Internationale Handelsgesellschaft mbH v. Einfuhr Vorratsstelle für Getreide und Futtermittel*, [1974] 2 C.M.L.R. 540 (German Federal Constitutional Court); and cf. *N.V. Algemene Transport- en Expeditie Onderneming van Gend en Loos v. Nederlandse Tariefcommissie*, [1963] C.M.L.R. 105 at p. 129 (European Court of Justice).

<sup>3</sup> Charter Art. 2 (1). On the relationship between State sovereignty and the Charter see also Bourquin, *L'état souverain et l'organisation internationale* (1959); Ninčič, *The Problem of Sovereignty in the Charter and in the Practice of the United Nations* (1970); Korowicz, *Organisations internationales et souveraineté des états membres* (1961), pp. 185-257.

<sup>4</sup> Cf. the relations between independent members of the Commonwealth: Jennings, *this Year Book*, 30 (1953), pp. 320-51.

<sup>5</sup> *Supra*, p. 123.

<sup>6</sup> *Recueil des cours*, 73 (1948), pp. 171-253 at p. 220.



'special claims of right' are rights under general international law: for example, the rights of a belligerent occupant. Included in the category 'special claim of right' for example would be the claim of the Government of Great Britain to bind the Dominions, without their separate consent, to the Treaty of Lausanne, 1924;<sup>1</sup> or the claim of the Porte to conclude concessions for lighthouses in Crete and Samos.<sup>2</sup> The acceptance by the Nationalist authorities of the proposition that Taiwan is part of a single China is perhaps a further example.<sup>3</sup> In this context it is crucial that the governmental authority is claimed as of right, and not on a basis of consent by the local unit.

(2) *Discretionary authority to determine upon and effect intervention in the internal affairs of the putative State.* Such authority, whether or not the result of a treaty or other consensual arrangement, would appear to be inconsistent with formal independence. A most striking example was the British claim to 'paramountcy' over the Indian Native States.<sup>4</sup> What is crucial here is *la compétence de la compétence*; the undetermined powers of intervention possessed by France in respect of Monaco, for example, have led to doubts concerning the latter's independence.<sup>5</sup> The point is that, in the absence of machinery for adjudication, a broad discretionary power of intervention could always be used with colour of right to deny local independence.

(b) *Actual independence.* Apart from formal independence, it may be necessary to inquire further as to the actual or effective independence of the putative State: this element corresponds to Rousseau's '*plénitude de la compétence*'.<sup>6</sup> Actual independence is essentially relative, or in Rousseau's term 'quantitative': the difficulty of applying it arises because it is a matter of degree.<sup>7</sup>

Actual independence, for our purposes, may be defined as the minimum degree of real governmental power at the disposal of the authorities of the putative State, necessary for it to qualify as 'independent'. It is thus a matter of political fact, and its evaluation in specific cases will tend to raise, whether in an international or a municipal forum, particularly acute problems. Nevertheless, it need not be said that the problem 'escape[s] all definition'.<sup>8</sup> The way in which a rule is applied to the sorts of factual situations that arise is hardly less of a legal problem than the enunciation of the rule itself: this is especially

<sup>1</sup> See Dawson, *The Development of Dominion Status 1900-1936* (1937), pp. 258-72; cf. Keith, *The Sovereignty of the British Dominions* (1929), pp. 390-6.

<sup>2</sup> *Lighthouses in Crete and Samos*, *P.C.I.J.*, Series A/B, No. 71 (1937).

<sup>3</sup> Cf. *supra*, p. 93 n. 9.

<sup>4</sup> As to which see Fawcett, *The British Commonwealth in International Law* (1963), pp. 126-9; Sen, *The Indian States* (1930); Somervell, *this Year Book*, 11 (1930), pp. 55-62; cf. *Rann of Kutch* arbitration, *International Legal Materials*, 7 (1968), pp. 633 at pp. 657, 675, 696.

<sup>5</sup> Another example was Cuba under the Treaty of Future Relations of 22 May 1903, incorporating the Platt Amendment in the Act of Congress of 2 March 1901: *British and Foreign State Papers*, vol. 96, p. 548, especially Art. 3. The debate among international lawyers is summarized by Fitzgibbon, *Cuba and the United States 1900-1935* (1935), pp. 89-93. The 1903 Treaty was abrogated by a much less draconian Treaty of 29 May 1934: *League of Nations Treaty Series*, vol. 153, p. 369.

<sup>6</sup> *Recueil des cours*, 73 (1948), p. 171 at p. 248.

<sup>7</sup> Cf. *Duff Development Co. v. Government of Kelantan*, [1924] A.C. 797, at p. 814 *per* Viscount Finlay.

<sup>8</sup> Marek, *Identity and Continuity*, p. 112.

so when the rule is of a general, and thus unhelpful, character. An examination of the practice reveals, first, that the degree of actual independence necessary to satisfy this branch of the rule may be minimal, but that in cases of conflict of legal rights the rule is of considerable importance; and, secondly, that there are several presumptions as to the existence or otherwise of actual independence, which aid in application, and indeed condition the application, of the rule. Again the rule may be illustrated by an examination of factors which have been regarded as relevant.

### 1. *Situations not derogating from actual independence*

(1) *Diminutive size and resources.* Diminutive size and resources are consistent with both formal and actual independence, as has been seen.<sup>1</sup>

(2) *Political alliances: Policy orientation between States.* The existence of close political and ideological links between States is a feature of post-war (indeed of any) international relations. Such links do not of themselves derogate from actual independence.<sup>2</sup>

(3) *Belligerent occupation.* Pending a final settlement of the conflict, belligerent occupation does not affect the continuity of the State.<sup>3</sup> The governmental authorities may be driven into exile or silenced, and the exercise of the powers of the State thereby affected. But it is settled that the powers themselves continue to exist. This is strictly not an application of the 'actual independence' rule but a legal exception from it.

(4) *Illegal intervention.* Equally, illegal intervention, in the absence of *debellatio*, does not extinguish either the formal or (up to a point) the actual independence of the State. The Soviet invasion of Czechoslovakia, and subsequent events there, were not regarded by other States as putting an end to the existence of Czechoslovakia as a State. The same was true of the earlier intervention in Hungary, although the credentials of the Hungarian delegation were not approved in the period 1956-63, as a gesture of disapproval of the Kadar government.<sup>4</sup> No equivalent action has been taken in the Czechoslovak case. On the other hand, the continuance of even an illegal occupation for a sufficiently

<sup>1</sup> *Supra*, pp. 111, 114.

<sup>2</sup> This issue was raised by the Anglo-Iraqi Treaty of Alliance of 30 June 1930, *British and Foreign State Papers*, vol. 132, p. 280, intended to regulate relations after the termination of the Mandate. The treaty provided for 'co-ordination' of foreign policies (Art. 1), mutual assistance in war (Art. 4), and granted to the U.K. extensive facilities in time of war, including two permanent air bases (Art. 5). The 'sovereign rights of Iraq' were reserved, and the treaty was to be renegotiated after twenty-five years. The new treaty, it was agreed, must still preserve Britain's essential communications (Art. 11). The Permanent Mandates Commission, while expressing certain reservations, nevertheless concluded that . . . 'although certain of the provisions of the Treaty . . . were somewhat unusual in treaties of this kind, the obligations entered into by Iraq towards Great Britain did not explicitly infringe the independence of the new State': Main, *Iraq from Mandate to Independence* (1955), pp. 104-12. The Treaty of Alliance came into force upon Iraq's admission to the League on 3 October 1932. It was replaced by a Special Agreement of 4 April 1955: *British and Foreign State Papers*, vol. 162, p. 112, when the British bases were closed down.

<sup>3</sup> Cf. Marek, *Identity and Continuity*, pp. 73-216. For Iran (1941-6), see *infra*, p. 134.

<sup>4</sup> Higgins, *Development*, pp. 158-9; other cases of allied and belligerent occupation are discussed *infra*, pp. 130-3.



long time after the cessation of hostilities will lead to the extinction of the occupied State by *debellatio*:<sup>1</sup> this must be taken to have been the case with Hyderabad.<sup>2</sup>

2. *Situations derogating from actual independence.* Three factors are relevant here.

(1) *Substantial illegality of origin.* Where an entity comes into existence in violation of certain basic rules of international law, its title as a 'State' is in issue. Traditionally, international law in matters of statehood has been based almost exclusively on the principle of effectiveness;<sup>3</sup> although illegality of origin might be considered as grounds for non-recognition. The question whether, and to what extent, the modern law has developed criteria of statehood not based on effectiveness is examined in the next section.

(2) *Entities formed under belligerent occupation.* However in at least one case pre-1939 international law appeared to condition effectiveness by considerations of legality. As has been said, it was, and remains, clear law that belligerent occupation does not deprive the occupied State of its independence, though it might suspend the exercise of the powers of the State.<sup>4</sup> As a result, even before 1939, any new 'State' established during belligerent occupation was presumed not to be independent.<sup>5</sup> But it is important to note that this was rather a presumption than a substantive rule. The independence of the illegal entity was probably not precluded, although of course its formation might attract the responsibility of the occupying State.

This distinction between illegality of origin and effectiveness was, however, blurred during the Manchurian crisis. There, as the Lytton Commission found, Japanese action contrary both to the Covenant and the Kellogg-Briand Pact had resulted in the establishment of the 'State of Manchukuo', a puppet State under Japanese control.<sup>6</sup> This inspired the well-known 'Stimson doctrine': the refusal of the United States, and of the large majority of the League, to 'admit the legality of any situation *de facto* . . . which may impair . . . the sovereignty, the independence, or the territorial and administrative integrity of the Republic of China . . .' or to recognize 'any situation . . . brought about by means contrary to the covenants and obligations of the Pact of Paris of August 27, 1928' [or, in the case of League Members, of the Covenant].<sup>7</sup> In its

<sup>1</sup> *Post*, p. 174.

<sup>2</sup> As to which see Higgins, *Development*, pp. 51-2; Eagleton, *American Journal of International Law*, 44 (1950), pp. 277-302; *Foreign Relations of the United States*, 1948-V, pp. 360-1, 373, 411, 417.

<sup>3</sup> See Kelsen, *Principles of International Law* (2nd edn., 1966), pp. 420-33; Touscoz, *Le principe d'effectivité dans l'ordre international* (1964), pp. 125-8, and *post*, pp. 144-8, for further discussion.

<sup>4</sup> *Supra*, p. 127.

<sup>5</sup> Marek, *Identity and Continuity*, pp. 111-26: the same rule applies to puppet governments.

<sup>6</sup> Manchukuo's independence was proclaimed on 18 February 1932, under the former Chinese Emperor Henry Pu-yi. The regime was eventually recognized by or had relations with Japan (see the Protocol of Good Neighbourship, 1932: *British and Foreign State Papers*, vol. 135, p. 637), San Salvador, Germany, Italy and Poland.

<sup>7</sup> Secretary of State to Chinese and Japanese Govts., 7 January 1932: *Foreign Relations of the United States*, 1932-III, p. 7; endorsed by Assembly Resolution of 24 February 1933:



reply to the Stimson note, the Japanese Government, while denying responsibility, doubted whether 'the impropriety of means necessarily and always avoids the end secured',<sup>1</sup> a point the 'academic validity' of which was conceded by some commentators.<sup>2</sup> Since Manchukuo was both illegally created and not independent, the need to distinguish the two points did not arise. But extensive inquiry by the League and its Committees into the reality or otherwise of Manchurian independence would have been unnecessary if the illegality of its creation operated as a permanent bar on statehood.<sup>3</sup>

For present purposes then, the following rules were established by 1945:

(i) Where a putative State (or government) was created in territory under belligerent occupation, there was a strong presumption against its real independence.

(ii) A non-independent 'State' (or 'government') so established was regarded as no more than the agent of the belligerent occupant, with no more competence to bind the occupied State than its principal. The status of these rules in the modern law will be discussed in the next section.<sup>4</sup>

(3) *Substantial external control of the State*. It is established that an entity which, while possessing the formal marks of independence, is in substance subject to foreign domination and control is not 'independent' for the purposes of statehood in international law. In applying this principle, two difficulties arise. First, in certain cases at least, external interference may not be regarded as 'foreign', and may not therefore derogate from the statehood of the entity concerned. For example, the fact that a foreign citizen is head of State does not necessarily mean that the State concerned is subject to foreign control, if the head of State operates as the local government or upon the advice of such a government.<sup>5</sup> But these examples are exceptional, and limited in scope. What is necessary in this type of case is a relatively precise and binding understanding as to the capacity in which the various powers are exercised.<sup>6</sup>

Secondly, and more generally, the problem is to determine at what point foreign influence becomes 'control' or 'domination'. This is notoriously difficult. However, examination of some of the cases of 'non-independent States' may help to indicate certain basic criteria.

(I) *Protected States*. An illustration of the problem of lack of real independence is provided by the case of Kelantan. Under an Agreement of 1910 the Sultan

*League of Nations Official Journal*, Special Supplement No. 101/I, p. 87. Japanese action in Manchuria was in violation of Art. 12 of the Covenant, but in view of the fact that the hostilities were not part of a declared 'war', there was doubt whether Japan was technically in breach of Art. 16 ('resort to war'): Lauterpacht, *American Journal of International Law*, 28 (1934), pp. 43-60. There was, however, a clear breach of Art. 2 of the Pact of Paris: *British and Foreign State Papers*, vol. 128, p. 447. See also Jessup, *Birth of Nations* (1975), pp. 305-34.

<sup>1</sup> *American Journal of International Law*, 26 (1932), p. 343.

<sup>2</sup> Wright, *ibid.*, pp. 342-8 at p. 345. <sup>3</sup> See also *post*, pp. 165-6. <sup>4</sup> *Post*, pp. 164-73.

<sup>5</sup> This is the case with those Commonwealth Members which have retained the Crown as Head of State. For the curious case of Rajah Brooke, see Smith, *Great Britain and the Law of Nations*, vol. 2, pp. 83-96.

<sup>6</sup> This is the crucial problem with Andorra: see this writer, *Revue de droit international, de sciences diplomatiques et politiques*, 55 (1977), pp. 259-73.

agreed to have no political relations with any foreign power except through the British Government and to follow in all matters of administration (save those touching the Mohammedan religion and Malay custom) the advice of a British adviser.<sup>1</sup> The House of Lords was subsequently faced with the issue of the sovereign immunity of the Sultan in British courts, which was settled in the Sultan's favour by a Foreign Office certificate. The substantive point was, however, raised in an interesting way: it was said that the certificate (which incorporated the text of the 1910 Agreement) was self-contradictory, and that the matter was thus effectively still open. Counsel for the Company argued that [t]he distinguishing mark of an independent sovereign power is that it has reserved to itself the right to manage its own internal affairs, but by the terms of the agreement . . . the King of England has the right to appoint a resident official to tell the Sultan . . . how he is to manage the internal affairs of his country. That is wholly inconsistent with the idea of an independent sovereignty as that term is understood by jurists of repute . . .<sup>2</sup>

For the Sultan it was argued merely that 'some dependence on the protecting power is not inconsistent with sovereignty'.<sup>3</sup> The majority of the Court held the certificate not to be contradictory since the Foreign Office must be taken to have considered the Agreement before determining the question: its determination was in any case conclusive, irrespective of conflict. However, Viscount Finlay and Lord Carson (who dissented on a different point) disagreed on the question of real independence. Viscount Finlay thought that

[w]hile there are extensive limitations upon its independence the enclosed documents do not negative the view that there is quite enough left to support the claim to sovereignty.<sup>4</sup>

Lord Carson, on the other hand, thought it

difficult to find in these documents the essential attributes of independence and sovereignty in accordance with the tests laid down by the exponents of international law.<sup>5</sup>

The case was perhaps borderline, but it is difficult to see that the Government of Kelantan had much, if any, real power at all. Lord Carson was thus probably right on the general issue, but as Fawcett has pointed out, British practice has favoured the immunity of even merely formal sovereigns or princes.<sup>6</sup>

(II) *So-called puppet States*. The term 'puppet State' is used to describe nominal sovereigns under effective foreign control, especially in cases where the establishment of the puppet State is intended as a cloak for manifest illegality. The creation of Manchukuo has already been mentioned: in that case the Lytton Commission's Report of October 1932 found as a fact that:

The independence movement, which had never been heard of in Manchuria before

<sup>1</sup> *British and Foreign State Papers*, vol. 103, p. 518, Arts. 1-2.

<sup>2</sup> *Duff Development Co. v. Government of Kelantan*, [1924] A.C. 797, at p. 800.

<sup>3</sup> *Ibid.*, p. 803.

<sup>4</sup> *Ibid.*, p. 816.

<sup>5</sup> *Ibid.*, p. 830.

<sup>6</sup> *The British Commonwealth in International Law* (1963), pp. 126-9.



September 1931, was only made possible by the presence of Japanese troops and for this reason the present regime cannot be considered to have been called into existence by a genuine and spontaneous independence movement<sup>1</sup>

—a conclusion endorsed by the League Assembly.<sup>2</sup> On this basis Manchuria was held to be still Chinese territory, although it remained in Japanese control until 1945. The Yalta Agreement provided merely that China would 'retain full sovereignty in Manchuria'.<sup>3</sup> No formal action was deemed necessary for the reacquisition by China of the Three Provinces, and there was no reference to Manchuria in the Peace Treaty of 1951. In particular there was no retrocession or renunciation of title by Japan.<sup>4</sup> This provides strong confirmation of the view that Manchuria remained under Chinese sovereignty in the period 1932-45.

The same conclusion must be reached with regard to two European 'States' established in German occupied territories. Slovakia was a nominally independent part of Czechoslovakia under German protection from 18 March 1939 to April 1945. It was accorded a certain degree of recognition at least *de facto* prior to September 1939,<sup>5</sup> but there can be little doubt as to its puppet character.<sup>6</sup> Croatia was also established on occupied (Yugoslavian) territory, between 1941 and 1945. A United States International Claims Commission held that Yugoslavia was not a successor State to Croatia, and that damage to property caused by the puppet State was not action 'by Yugoslavia':

Croatia embraced approximately one-third of the total area of Yugoslavia and approximately one-third of its population. At all times during the period of its existence as a so-called independent State, forces headed by Mihailovic and Tito conducted organized resistance within it. At no time . . . was Croatia's control of its territory and population complete. It was created by German and Italian forces and was maintained by force and the threat of force, and as soon as the threat subsided Croatia ceased to exist. . . . [I]t appears well established that . . . Croatia was . . . during its entire 4-year life, . . . subject to the will of Germany or Italy or both, in varying degrees, except as to civil administration matters. . . . It was unwanted by, and never became a part of, the permanent Government of Yugoslavia. It was not established through any dereliction on the part of the Government of Yugoslavia and that Government had no control over the acts of Croatia. It further seems clear that neither the Government of Yugoslavia nor its peoples received benefits from the takings alleged . . . Croatia is defined

<sup>1</sup> League of Nations Publication 1932 VII A.12, p. 71; in Wright *et al.*, *Legal Problems in the Far Eastern Conflict* (1941), pp. 57-8.

<sup>2</sup> Resolution of 24 February 1933: *League of Nations Official Journal*, Special Supplement No. 101/I, p. 87. *Contra* Cavaré, *Revue générale de droit international public*, 42 (1935), pp. 5-99.

<sup>3</sup> Whiteman, *Digest*, vol. 3, pp. 600-26 at p. 600.

<sup>4</sup> But by Art. 8 (a) Japan recognized *inter alia* 'any other arrangements by the Allied Powers for or in connection with the restoration of peace': *United Nations Treaty Series*, vol. 136, p. 45. Cf. *In re Nepogodin's Estate*, I.L.R., 22 (1955), p. 90 (Manchuria part of China in 1945).

<sup>5</sup> Marek, *Identity and Continuity*, pp. 287-91 at p. 290. The U.S. did not recognize it: *Foreign Relations of the United States*, 1941-III, pp. 32-3. The Czechoslovak Government-in-exile was recognized by the Allies during the War: e.g., *Hansard*, H.C. Deb. (5th Ser.), vol. 356, col. 522 (20 December 1939); *ibid.*, vol. 373, col. 861 (18 July 1941). This must have involved withdrawal of the previous *de facto* recognition accorded to Slovakia. See also Lemkin, *Axis Rule in Occupied Europe* (1944), pp. 139-44; Langer, *Seizure of Territory*, pp. 207-44.

<sup>6</sup> Marek, *op. cit.* (previous note); *Foreign Relations of the United States*, 1948-IV, p. 434; *contra* Mikus, *La Slovaquie dans le drame de l'Europe* (1955), pp. 97-204.



by contemporary writers as a 'puppet state' or 'puppet government', terms which appear to be of comparatively recent adoption in the field of international law. . . . A 'puppet state' or local *de facto* government such as Croatia also possesses characteristics of 'unsuccessful revolutionists' and 'belligerent occupants'. It is . . . settled that a State has no international legal responsibility to compensate for damage to or confiscation of property by either. . . . [F]or the reasons . . . given . . . the Government of Yugoslavia is not factually or legally a successor to the Government of Croatia.<sup>1</sup>

Although the findings of fact, and the actual decision reached by the Tribunal, were undoubtedly correct, it is doubtful whether comparison of a puppet entity with a local *de facto* government is of much value. Puppet entities—whether 'States' or 'governments'—bind the existing State only so far as the Geneva Conventions allow:<sup>2</sup> different tests apply to genuine *de facto* governments. Moreover, even if a puppet entity extended over the entire State, its status would be the same; that is not true of *de facto* governments. Finally, it is clear that Croatia was a 'puppet State', not a 'puppet government' of an existing State. The distinction is not without consequences for the extinction or continuity of the previous State.

In the absence of general recognition or other special factors, the status of a puppet entity, and its international capacity, are therefore minimal. Thus a request for annexation or intervention made by the puppet Government of an admitted State is without international validity: the Baltic States annexed in 1940 by the Soviet Union provide the best example.<sup>3</sup> Neither can a cession of territory by such a Government bind the State.<sup>4</sup> It is established, in both types of case, that the existence of a puppet entity does not *per se* lead to the extinction of the previously existing State.<sup>5</sup>

The question remains how the puppet character of a given entity is to be determined. In practice this raises less difficulty than might have been thought. The presumption of puppet character of regimes constituted under belligerent occupation,<sup>6</sup> or subsequent to illegal intervention or to the threat or use of force, is frequently of assistance. Apart from that, it is of course a question of fact. In the cases mentioned, the factors taken into account have included the following: that the entity concerned was established illegally, by the threat or use of external armed force; that it did not have the support of the vast majority of the population it claimed to govern; that in important matters it was subject to foreign direction or control;<sup>7</sup> that it was staffed, especially in

<sup>1</sup> *Socony Vacuum Oil Co. Claim*, I.L.R., 21 (1954), p. 55 at pp. 58–62. Cf. the useful analysis by Sereni, *American Political Science Review*, 35 (1940), pp. 1144–51.

<sup>2</sup> See further *post*, pp. 180–1.

<sup>3</sup> Marek, *Identity and Continuity*, pp. 375–416; *post*, pp. 175–6.

<sup>4</sup> On the Lublin Government of Poland, see Lauterpacht, *Recognition*, p. 353 n. 1; but cf. Marek, *Identity and Continuity*, Pt. IX.

<sup>5</sup> See further this writer, 'The Polish Question at Yalta and Potsdam', *Studies for a New Central Europe*, Series 4, No. 1 (1977), pp. 89–100.

<sup>6</sup> *Supra*, p. 128.

<sup>7</sup> But the influence of a belligerent occupant on a pre-existing government in the occupied State may not be enough: the Vichy regime was regarded as the genuine government of France until 1944. As a result de Gaulle's Free French were not accorded recognition as the French government-in-exile: see, e.g., *Hansard*, H.C. Deb. (5th ser.), vol. 371, col. 1713 (27 May 1941); Flory, *Le statut international des gouvernements réfugiés* (1952).

more important positions, by nationals of the dominant State. It was not regarded as relevant that certain individuals or groups (including minority groups) in the territory concerned carried out normal administrative functions, or constituted the formal government, if the elements mentioned above were present.<sup>1</sup> In such circumstances, any acts of a puppet entity must be regarded as void *ab initio*, as far as binding the previously effective State is concerned, except to the extent that they can be regarded as acts of the belligerent occupant itself,<sup>2</sup> and unless and until ratified by an effective government of the State concerned. Thus by Article 31 of the Peace Treaty of 1947, Italy recognized that all agreements and arrangements made between Italy and the authorities installed in Albania by Italy from April 7, 1939 to September 3, 1943, are null and void.<sup>3</sup>

(III) *Other cases of absence or loss of actual independence.* The category of non-independent entities is not, of course, closed; nor would much purpose be served by further detailed description.<sup>4</sup> The basic contention is that the degree of actual independence necessary, as a matter of general international law, and apart from special requirements that may exist in particular cases, is fairly minimal.<sup>5</sup> To prove lack of real independence, one must show

foreign *control* overbearing the decision-making of the entity concerned on a wide range of matters and doing so systematically and on a permanent basis.<sup>6</sup>

To establish such lack of independence, in the absence of foreign occupation or illegal military intervention, is thus to overcome a formidable burden of proof, though it may be said that in practice puppet or non-independent entities are often self-evident.<sup>7</sup> Perhaps the most difficult case is that where an existing government remains in power during a period of foreign occupation

<sup>1</sup> Other cases of puppet entities include Napoleonic Holland (Marek, *Identity and Continuity*, pp. 170-3); the Kuusinen Government of Finland, 1939-40 (*ibid.*, pp. 66-8); and Albania, 1939-44 (*ibid.*, pp. 331-7). On the puppet government set up by the Japanese in the Philippines, see *Foreign Relations of the United States*, 1943-III, pp. 1105-7; United Nations Legislative Series, *Materials on Succession of States* (1967), pp. 143-6.

<sup>2</sup> Cf. *In re G.*, *Annual Digest*, 12 (1943-5), No. 151 (on the puppet governments in Greece during the Second World War); Ténékidès, *Revue générale de droit international public*, 51 (1947), pp. 113-33.

<sup>3</sup> *United Nations Treaty Series*, vol. 49, p. 3.

<sup>4</sup> Cf. Marek, *Identity and Continuity*, p. 336; and see generally Verhoeven, *Reconnaissance*, pp. 54-64, 93-9.

<sup>5</sup> Cf. the interesting discussion in Hart, *The Concept of Law* (1961), pp. 216-17, where the requirement of independence is described as variable and essentially 'negative in force'. Kamanda, *The Legal Status of Protectorates in Public International Law*, pp. 188-91, goes so far as to describe it as a fiction. As a legal concept, however, although its operation is variable, it will often be far from 'fictional' in effect. The most important 'particular case' is secession in a non-colonial context, where substantial and continued independence is required: *post* pp. 137-8.

<sup>6</sup> Brownlie, *Principles*, p. 76 (his italics); Eagleton, *International Government* (3rd edn., 1957), pp. 82-3, has 'regular control or direction by another State'.

<sup>7</sup> The lengthy opposition to Mongolia's U.N. admission was, ostensibly at least, based on lack of effective independence. After ten rejections in the Security Council (1946-57) the Mongolian People's Republic was eventually admitted by S.C. Res. 166 (1960) (9-0:1, 1 n.p.); G.A. Res. 1630 (XVI), 27 October 1961 (accl.). Cf. the pertinent comments of Higgins, *Development*, pp. 28-30, 40; and see generally Friters, *Outer Mongolia and its International Position* (1951); Nemzer, *American Journal of International Law*, 33 (1939), pp. 452-64; Hackworth, *Digest*, vol. 1, pp. 75-6; Whiteman, *Digest*, vol. 3, pp. 600-16.



in time of war, a situation which occurs both with respect to allied and enemy forces. The case of Vichy France has been mentioned already.<sup>1</sup>

The extent to which statehood may coexist with substantial lack of independence is demonstrated by the case of Iran under Allied occupation from 1941 to 1946. In August 1941, Soviet and British forces occupied Iran to forestall fears of impending German control. Both parties emphasized that they had no designs on Iranian sovereignty or territorial integrity<sup>2</sup> and that the occupation of the country would be temporary.<sup>3</sup> The occupation was followed by a change in government, Reza Shah Pahlevi replacing his father. The former was not regarded as a puppet government, and the change in government was widely recognized.<sup>4</sup> The American view was that the British and Russian occupation was necessary and justified, although fears were expressed as to the future independence of Iran.<sup>5</sup> At the Teheran Conference, the three Allies reaffirmed 'their desire for the maintenance of the independence, sovereignty and territorial integrity of Iran.'<sup>6</sup> Under these circumstances, there was little justification for any view that Iran had in some way ceased to exist, despite the inability of the Iranian government effectively to control events in parts of its territory during the war.<sup>7</sup>

### (iii) *The relationship between formal and actual independence*

In discussing the relationship between the notions of formal and actual independence, it is necessary again to refer to the different contexts in which the problem arises.<sup>8</sup> In some situations independence tends to be a purely formal criterion; in others, a substantial degree of actual or material independence is required. The three most significant such situations will be referred to in turn.

(a) *Devolution*. Like the competence to cede territory, the competence to transfer governmental power in part of the metropolitan territory to a new State appears to be regarded as an attribute of State sovereignty.<sup>9</sup> There is, however, this difference, that in the latter case a new legal person is created, and the legal position of third States is *pro tanto* affected. The power is thus an important one, but it would seem that there are relatively few legal limitations to its

<sup>1</sup> *Supra*, p. 132 n. 7.

<sup>2</sup> *Foreign Relations of the United States*, 1941-III, p. 439. See also the Tripartite Treaty of Alliance of 29 January 1942: *British and Foreign State Papers*, vol. 144, p. 1017, Arts. 1, 4, 6.

<sup>3</sup> *Ibid.*, and cf. *Foreign Relations of the United States*, 1941-III, p. 443.

<sup>4</sup> *Ibid.*, p. 462.

<sup>5</sup> Memorandum of 23 January 1943: *ibid.*, 1943-IV, pp. 331-3; cf. pp. 378-9.

<sup>6</sup> Declaration regarding Iran, 1 December 1943: *ibid.*, p. 413.

<sup>7</sup> For the Soviet refusal to evacuate northern Iran, and the Azerbaijan secession movement, see *ibid.*, 1945-VIII, pp. 359-522; *ibid.*, 1946-VIII, pp. 289-567; Hamzavi, *Persia and the Powers, An Account of Diplomatic Relations 1941-1946* (1946). For a strong application of the same presumption in favour of continued independence, cf. *Restitution of Household Effects belonging to Jews deported from Hungary* (1965), I.L.R., vol. 44, p. 301 (Hungary under German control, 1938-44). The decision would undoubtedly have been different if an occupied *enemy* State's legislation had been in point.

<sup>8</sup> Cf. *supra*, p. 120.

<sup>9</sup> Pufendorf, *De Jure Naturae et Gentium Libri Octo*, Bk. VII, Ch. 3, § 690; *supra*, p. 96.



exercise. That this is so is no doubt due to the absence of any political desire, and, perhaps, any need, to regulate the number of new States.

A variety of means has been used to transfer competence to the local entities: municipal legislation,<sup>1</sup> the termination of treaties of protection,<sup>2</sup> the conclusion of an agreement in the nature of a treaty between the former sovereign and the new State,<sup>3</sup> or a combination of some of these methods.

The effect of metropolitan consent or recognition in these situations is amply demonstrated in State practice. In a study of United States recognition policies with respect to sixty new States, O'Brien and Goebel note that forty-five States were accorded 'instantaneous' or even 'anticipatory' recognition.<sup>4</sup> Such recognition would have been quite improper without the consent or acquiescence of the previous sovereign.<sup>5</sup> It is thus not the case in modern practice that 'the mere declaration by the metropolitan State that independence has been granted is not of itself sufficient'.<sup>6</sup> On the contrary, modern practice demonstrates with some consistency the proposition that, *prima facie*, a new State granted full formal independence by the former sovereign has the international right to govern its territory as a State. The Congo after 1960, which possessed full formal independence but very little control in practice, is a clear example.<sup>7</sup>

On the other hand, where the grant of independence is fictitious or falls short of the formal relinquishment of control by the previous sovereign, different considerations apply. The cases of Syria and Lebanon (1942-6) provide a good illustration. These two 'A' Mandates had been 'provisionally recognized' as independent in 1919, but had remained under effective French control until 1940.<sup>8</sup> In 1941, Allied Forces evicted the Vichy French administration and installed a Free French administration under General Catroux. By proclamation of 27 September 1941 the French Delegate-General purported to transfer to Syria

all rights and prerogatives of an independent and sovereign State, limited only by the exigencies of the war and the security of its territory.<sup>9</sup>

<sup>1</sup> Cf. Roberts-Wray, in Anderson (ed.), *Changing Law in Developing Countries* (1963), pp. 43-62; *Liyanage v. R.*, [1967] 1 A.C. 259 at p. 286.

<sup>2</sup> e.g. Kuwait: see Al Baharna, *The Legal Status of the Arabian Gulf States* (1968), p. 114; Exchange of Notes of 19 June 1961; *British and Foreign State Papers*, vol. 166, p. 112. Cf. Pillai and Kumar, *International and Comparative Law Quarterly*, 11 (1962), pp. 108-30; O'Brien and Goebel, in O'Brien (ed.), *The New Nations in International Law and Diplomacy* (1965), pp. 165-7.

<sup>3</sup> e.g. Articles of Agreement for a Treaty between Great Britain and Ireland, 6 December 1921, *League of Nations Treaty Series*, vol. 26, p. 10.

<sup>4</sup> O'Brien and Goebel, loc. cit. (above, n. 2), pp. 207 ff., especially at p. 212. In only two cases (India and Burma) was recognition anticipatory of independence by more than a few days. Of the thirteen cases of delayed recognition, three (Senegal, Guinea and probably Morocco) were political and two (Nepal and Yemen) were probably the result of the isolation of the entities in question. In the other eight cases subsisting disputes, or doubts about independence, were regarded as justifying the withholding of recognition. Cf. also Myers, *American Journal of International Law*, 55 (1961), p. 703; Verzijl, *International Law in Historical Perspective*, vol. 2, pp. 66-89; Verhoeven, *Reconnaissance*, pp. 12-19.

<sup>5</sup> *Post*, pp. 137-8.

<sup>6</sup> Hone, *Report of International Law Conference, 1960*, pp. 14-16, cited O'Brien and Goebel, loc. cit., (above, n. 2), p. 308 n.

<sup>7</sup> *Supra*, pp. 106-7.

<sup>8</sup> Cf. Whiteman, *Digest*, vol. 2, pp. 188-9.

<sup>9</sup> *Foreign Relations of the United States, 1941-III*, p. 786. Cf. Whiteman, *Digest*, vol. 2, p. 189

The United Kingdom shortly accorded recognition to Syria and Lebanon,<sup>1</sup> but the United States declined to do so,<sup>2</sup> agreeing only to accredit a 'diplomatic agent'.<sup>3</sup> In March 1943, when General Catroux replaced the existing Syrian regime with a new provisional government,<sup>4</sup> Secretary of State Hull described the change as 'essentially only a replacement of one French-appointed regime for another'.<sup>5</sup> While accepting the need for control of certain aspects of government by the military authorities, the State Department required 'a considerable degree of independence' with respect to civilian activities.<sup>6</sup> Specifically, Acting Secretary of State Willis on 22 August 1943 described his Government's

established policy to defer recognition of another executive until:

(1) It is in possession of the machinery of State, administering the government with the assent of the people thereof

(2) It is in a position to fulfil the international obligations and responsibilities incumbent upon a sovereign State under treaties and international law. We welcome the successful re-establishment of constitutional government in Syria as an important step toward the fulfilment of these conditions, but believe that there must be an effective transfer of substantial authority and power to the new government before serious consideration can be given to the extension of full recognition.<sup>7</sup>

In November 1943, after elections had been held, the French Delegate-General once again removed a local (in this case Lebanese) government—an action reversed only after strong Allied protests.<sup>8</sup> There followed an 'accelerated transfer of governmental powers': on 5 September 1944, the United States concluded that the local Governments may now be considered representative, effectively independent and in a position satisfactorily to fulfil their international obligations and responsibilities.<sup>9</sup>

'Full and unconditional' recognition followed, despite the continued presence of French troops in the Levant and the failure of the French and local governments to agree on a treaty of future relations. In the American view,

the war powers exercised by the French and British authorities . . . could not be (Lebanon). However, a French *aide-mémoire* at the same time argued that, because the Mandate required termination by the League, 'the regime . . . set up in Syria during the war cannot be anything but provisional': *Foreign Relations of the United States, 1941-III*, p. 791.

<sup>1</sup> Cf. *Hansard*, H.C. Deb. (5th ser.), vol. 393, col. 157 (27 October 1943).

<sup>2</sup> Memorandum of 16 December 1941: *Foreign Relations of the United States, 1941-III*, p. 813.

<sup>3</sup> '[T]he Department contemplates the extension only of limited recognition to Syria and Lebanon, at least for the present. Since diplomatic agents are accredited by the U.S. to areas such as Morocco which are less than fully independent, the establishment of such a rank in Beirut would be in accord with the existing situation there': *ibid.*, 1942-IV, p. 656; cf. pp. 663, 665. Other reasons for the U.S. refusal were the uncertainty over the future French position in the area, and the maintenance of U.S. rights under the treaty of 1924: *British and Foreign State Papers*, vol. 120, p. 399.

<sup>4</sup> It was argued that 'non-recognition by most foreign States justified in itself a continuing exercise of the mandatory power': *Foreign Relations of the United States, 1943-IV*, p. 956.

<sup>5</sup> *Ibid.*, p. 966.

<sup>6</sup> *Ibid.*, p. 970.

<sup>7</sup> *Ibid.*, p. 987; repeated in a Memorandum of 25 October, *ibid.*, pp. 1000-1 and cf. also pp. 1007-8.

<sup>8</sup> *Ibid.*, p. 1022 et seq.; Khadduri, *American Journal of International Law*, 38 (1944), pp. 601-20

<sup>9</sup> *Foreign Relations of the United States, 1944-V*, p. 774.



considered inconsistent with or derogatory to the independence of the States, since these powers have been freely and willingly granted and have been repeatedly confirmed by the local governments.<sup>1</sup>

The presence of French troops gave rise to further difficulty in May 1945, when force was used in an attempt to secure agreement on a treaty of future relations. A British ultimatum, accompanied by military intervention, ensued; but on this occasion, the illegality of French action was a corollary of the independence of Syria and Lebanon, and of their original membership of the United Nations.<sup>2</sup> The cases of Syria and Lebanon demonstrate how the criterion for independence in cases of devolution is a predominantly formal one, since even after October 1944 the local authorities were hardly fully effective in their own right.<sup>3</sup>

(b) *Secession*. On the other hand, where the local unit seizes its independence by secession, without the consent of the metropolitan State, both formal and a considerable degree of effective or actual independence are required. The strict test applied to Finland after 1918 by the League's Committee of Jurists<sup>4</sup> accurately states the requirement of independence in such cases.<sup>5</sup> Many other instances could be cited.

For example, in a letter to Lieven concerning the prospective Austrian recognition of Greece, Canning formulated the test as follows:

It is to be presumed that when the Austrian Plenipotentiaries speak of the acknowledgement of the Morea and the islands as an independent State, they intend that acknowledgement to be subject to the qualification that such State shall have shown itself substantially capable of maintaining an independent existence, of carrying on a Government of its own, of controlling its own military and naval forces, and of being responsible to other nations for the observance of international laws and the discharge of international duties.

These are questions of fact. By acknowledgement we can only acknowledge what is. We have never recognized in Spanish America any State in whose territory the dominion of the mother-country has not been practically extinguished, and which has not established some form of government with which we could treat.<sup>6</sup>

<sup>1</sup> *Ibid.*, p. 796 (5 October 1944).

<sup>2</sup> *Ibid.*, 1945-VIII, pp. 1093, 1124, 1130-1, 1179. For a full account see Longrigg, *Syria and Lebanon under French Mandate* (1958), pp. 317-38. Also Whiteman, *Digest*, vol. 2, pp. 188-98, 218-26; O'Brien and Goebel, *loc. cit.* (above, p. 135 n. 2), pp. 190-4.

<sup>3</sup> As we have seen (*supra*, p. 124), continuance of foreign troops on local territory by agreement is not a derogation from *formal* independence.

<sup>4</sup> *Aaland Islands* case, cited *supra*, p. 118 n. 1.

<sup>5</sup> For the problem of self-determination in this context see *post*, pp. 161-4.

<sup>6</sup> *British and Foreign State Papers*, vol. 40, p. 1216, 4 September 1826; reaffirmed *ibid.*, p. 1222. Cf. the Marquis of Lansdowne, *Hansard N.S.*, vol. 10, col. 974 (15 March 1824), cited Paxson, *The Independence of the South American Republics* (1903), p. 224. The Earl of Liverpool for the Government agreed that 'there could be no right (to recognize) while the contest was actually going on . . . so long as the struggle in arms continued undecided' (col. 999). But the timing of the actual decision, he asserted, was peculiarly a matter for the executive. In August 1823 the U.S. had also declined to recognize or aid the Greeks, pleading the constitutional incapacity of the President to declare war on Turkey, and the fact that Greek independence was not yet 'undisputed, or disputed without any rational prospect of success': *British and Foreign State Papers*, vol. 11, p. 300 (Adams).



The position was summarized by Harcourt:

When a sovereign State, from exhaustion or any other cause, has virtually and substantially abandoned the struggle for supremacy it has no right to complain if a foreign State treat the independence of its former subjects as *de facto* established; nor can it prolong its sovereignty by a mere paper assertion of right. When, on the other hand, the contest is not absolutely or permanently decided, a recognition of the inchoate independence of the insurgents by a foreign State is a hostile act towards the sovereign State . . .<sup>1</sup>

The strictness of this position is in marked contrast to the position in the case of States granted full formal independence by the previous sovereign, where a minimal degree of *de facto* control may suffice.

(c) *Subsistence and extinction of States*. Finally, we have seen that there is a strong presumption in favour of the continued independence of an existing State—even despite foreign military occupation, as with Iran after 1942.<sup>2</sup> In such cases, again, the criterion of independence appears to be a predominantly formal one.<sup>3</sup>

(d) *Conclusions*. The concepts of formal and actual independence analysed here are closely linked; their exact relationship is, however, complex. Where formal independence and actual independence as defined coexist, there is no problem. Equally, where formal independence masks lack of all actual independence the entity is to be regarded as not independent for the purposes of statehood.<sup>4</sup> Much more difficult is the intermediate case: that is, where a certain lack of formal independence coexists with substantial *de facto* independence—as with the Dominions in 1924.<sup>5</sup> It must be emphasized that the specific issues, and the specific legal consequences sought to be drawn from alleged lack of independence, are of great importance: so too, in borderline cases, are such factors as recognition (especially if the practice is consistent), and permanence, which may provide valuable confirmatory evidence.<sup>6</sup> Finally, in applying the flexible and in some situations minimal requirements of the independence rule, certain presumptions are of value.

In an opinion of 6 June 1844, Dodson advised that 'in December 1830 . . . the course of events had shown that the separation between Belgium and Holland consequent on the Revolution in the former country would be final . . .'. However, the 'independent political existence of Belgium had not . . . at that time assumed any definite shape'. It was, in his view, impossible to determine whether Britain had recognized Belgium as at 6 August 1831: Smith, *Great Britain and the Law of Nations*, vol. 1, pp. 245–7. The same strict test was applied by the British government to the Confederacy, e.g. Russell to Mason, 2 August 1862: *British and Foreign State Papers*, vol. 55, p. 733, cited Lauterpacht, *Recognition*, p. 17. See also Wright, in Falk (ed.), *The International Law of Civil War* (1971), pp. 30–109.

<sup>1</sup> *Letters by Historicus on some Questions of International Law* (1863), p. 9. Cf. Moore, *Digest*, vol. 1, p. 78 (Adams, 1818).

<sup>2</sup> *Supra*, p. 134.

<sup>3</sup> For problems of illegality and extinction see *post*, pp. 173–6.

<sup>4</sup> Subject to recognition (*post*, p. 142), or substantial illegality (*post*, pp. 144 et seq.).

<sup>5</sup> On the status of the Dominions in this period see Dunn, *Virginia Law Review*, 13 (1926–7), pp. 354–79; Fawcett, *The British Commonwealth in International Law* (1963), pp. 75–105; Johnston, *American Journal of International Law*, 21 (1927), pp. 481–9; Noel-Baker, *The Present Juridical Status of the British Dominions in International Law* (1929), *passim*.

<sup>6</sup> *Post*, p. 140.

1. As a matter of general principle, any territorial entity formally separate and possessing a certain degree of actual power is capable of being, and *ceteris paribus* should be regarded as, a State for general international law purposes. The denomination '*sui generis*' often applied to entities which, for some reason, it is desired not to characterize as States, is of little help. On the one hand the regime of rules concerning States provides a flexible and readily applicable standard; on the other, the induction of the multitude of necessary (and usually unexpressed) rules regarding a '*sui generis* entity' is both laborious and, usually, unnecessary. The assumption that, for example, 'internationalized territories' are *a priori* excluded from statehood in the legal sense is unwarranted, since it exaggerates the importance and rigidity of the international legal regime of statehood. Significantly, the International Court has never made that assumption.<sup>1</sup>

2. More specifically, it is submitted that independence for the present purposes may be presumed where: (i) an entity is formally independent, and (ii) its creation was not attended by serious illegality. On the other hand the presumption is against independence where either: (i) the entity in question is not formally independent, or (ii) though formally independent, its creation was attended by serious illegalities, or (iii) in the case of territory under belligerent occupation, a new regime is created with the express, tacit or implied consent of the occupant.<sup>2</sup>

3. There is also, as we have seen, a strong presumption in favour of the continued statehood of existing States, despite sometimes very extensive loss of actual authority.

4. Finally, as has been suggested, the presumption is in favour of the independence of a territorial unit as a whole, when it has been granted full formal independence by its former metropolitan State.<sup>3</sup>

It has been assumed here that an entity may become a State despite serious illegalities in the method or process of creation. In traditional international law that assumption was unchallenged, and the only problems were problems of application. The question will be examined in the next section.

## 6. SOVEREIGNTY

The term 'sovereignty' is sometimes used in place of 'independence' as a basic criterion for statehood. However, it has, as has been seen, another more viable meaning as an incident or consequence of statehood, namely, the

<sup>1</sup> Cf. the various statements of the Permanent Court on the status of Danzig: *Treatment of Polish Nationals in Danzig*, P.C.I.J., Series A/B, No. 44 (1932), pp. 23-4; *Polish War Vessels in the Port of Danzig*, Series A/B, No. 43 (1931), pp. 7, 18; *Free City of Danzig and the I.L.O.*, Series B, No. 18 (1930), p. 15; *Polish Postal Service in Danzig*, Series B, No. 11 (1925), pp. 39-40. *Contra*, Skubiszewski, in *Menzel Festschrift* (1975), p. 469 at pp. 471-4.

<sup>2</sup> See further *post*, pp. 164 et seq.

<sup>3</sup> *Supra*, pp. 134-5.

plenary competence that States *prima facie* possess.<sup>1</sup> Since the two meanings are distinct, it seems preferable to restrict 'independence' to the prerequisite for statehood, and 'sovereignty' to the legal incident.

The term 'sovereign' is also, it may be noted, used in other senses, for example, to indicate actual omnicompetence with respect to internal or external affairs. This meaning of the term 'sovereign' is perhaps the most common in political discourse. Nevertheless as a matter of international law a State or other entity has in general no entitlement to 'sovereignty' in this wider sense.

## 7. OTHER CRITERIA

Certain other criteria are sometimes suggested as necessary for statehood.

### (i) *Permanence*

The American Law Institute's Draft Restatement provides as a precondition for recognition, *inter alia*, that an entity 'shows reasonable indications that the(se) requirements . . . will continue to be satisfied.'<sup>2</sup> But no such requirement is contained in its definition of 'State'<sup>3</sup> and in fact States may have a very brief existence, provided only that they have an effective independent government with respect to a certain area and population. Thus the Mali Federation lasted only from 20 June to 20 August 1960, when it divided into two separate States. And British Somaliland was a State for five days, from 26 to 30 June 1960,<sup>4</sup> when it united with the former Italian Trust Territory of Somaliland to form the Somali Republic.<sup>5</sup>

This is not to say that permanence is not relevant to issues of statehood in some cases. In particular where another State's rights are involved (for example in a secessionary situation), or where certain criteria for statehood are said to be missing, continuance of an entity over a period of time is of considerable evidential value.<sup>6</sup> In the divided State situations, whatever the original legality of the establishment of certain of those regimes, long continuance has forced effective recognition of their position.<sup>7</sup> Permanence is thus not strictly a criterion

<sup>1</sup> *Supra*, p. 108. See especially Rousseau, *Recueil des cours*, 73 (1948), pp. 171-253, for a forceful argument in favour of the distinction and terminology adopted in the text—though his essay concerns rather the consequences of than the preconditions for statehood.

<sup>2</sup> *Restatement (2nd), Foreign Relations Law of the United States* (1965), § 100.

<sup>3</sup> *Ibid.*, § 4; *supra*, p. 111 n. 1.

<sup>4</sup> It was informally accorded separate recognition by the U.S.: *Department of State Bulletin*, 43 (1960), p. 87; Whiteman, *Digest*, vol. 1, pp. 216-17. See also Waldock, *I.L.C. Yearbook*, 1972-II, pp. 34-5; Contini, *Proceedings of the American Society of International Law*, 60 (1966), p. 127.

<sup>5</sup> An earlier and less well-known case was that of Yugoslavia, independent on 31 October 1918, which united with Serbia to form the Serb-Croat-Slovene State on 1 December 1918: Marek, *Identity and Continuity*, pp. 239-44; *contra*, *Peinitsch v. Germany*, *Recueil des Tribunaux Arbitraux Mixtes*, 2 (1923), p. 621.

<sup>6</sup> Cf. the U.S. position with regard to Yemen: Whiteman, *Digest*, vol. 2, pp. 240-1.

<sup>7</sup> *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)*, [1967] 1 A.C. 853 at p. 907 *per* Lord Reid. On the short-lived Italian Republic of Salò, see *Levi claim*, I.L.R., 24 (1957), p. 303; *Trèves claim*, *ibid.*, p. 313; and *Annual Digest*, 13 (1946), No. 4; I.L.R., vol. 29, pp. 21, 34, 51.



of statehood in the sense of an indispensable attribute; it is a sometimes important piece of evidence as to the possession of those attributes.

(ii) *Willingness and ability to observe international law*

It is sometimes said that 'willingness to observe international law' is a criterion for statehood.<sup>1</sup> But it is particularly necessary to distinguish recognition from statehood in this context. Unwillingness or refusal to observe international law may well constitute grounds for refusal of recognition,<sup>2</sup> or for such other sanctions as the law allows, just as unwillingness to observe Charter obligations is a ground for non-admission to the United Nations. Both are, however, distinct from statehood.<sup>3</sup>

A different, though connected, point is whether inability to observe international law may be grounds for refusal to treat the entity concerned as a State. H. A. Smith puts the point thus: 'a State which has fallen into anarchy ceases to be a State to which the normal rules of international intercourse can be applied'.<sup>4</sup> But again one must distinguish between permitted sanctions for breach of international obligations (which used to extend to armed reprisals and war), and a lack of responsibility for public order or government such that the territory concerned ceases to be part of the defaulting State or (if the whole State territory is concerned) such that it ceases to be a State. The former circumstance is clearly distinguishable from the latter and much more common. The latter case concerns not 'ability to obey international law' but a failure to maintain any State authority at all. As such it is referable to the criterion of government; reference to international law is unnecessary and confusing.

(iii) *A certain degree of civilization*

United States practice, in particular, has on occasions supported the view that, to be a 'State of International Law',

the inhabitants of the territory must have attained a degree of civilization such as to enable them to observe with respect to the outside world those principles of law which are deemed to govern the members of the international society in their relations with each other.<sup>5</sup>

But once again this requirement is better formulated as one of government: 'international law presupposes, not any common faith or culture, but a certain minimum of order and stability'.<sup>6</sup>

<sup>1</sup> Moore, *Digest*, vol. 1, p. 6; Hackworth, *Digest*, vol. 1, pp. 176-9; Whiteman, *Digest*, vol. 2, pp. 72-3, 78-82; and *supra*, p. 136 (Syria and Lebanon).

<sup>2</sup> Cf. *Restatement (2nd), Foreign Relations of the United States*, § 103. For U.S. practice see O'Brien and Goebel, *loc. cit.* (above, p. 135 n. 2), pp. 106 ff.

<sup>3</sup> Chen, *The International Law of Recognition*, pp. 61-2; Lauterpacht, *Recognition*, pp. 109-14; Charpentier, *op. cit.* (above, p. 94 n. 6), pp. 298-90; Brownlie, *Principles*, p. 80.

<sup>4</sup> *Great Britain and the Law of Nations*, vol. 1, pp. 18-19, citing an Opinion of Harding on anarchy in Mexico: FO. 83/2305, 20 March 1857.

<sup>5</sup> Hyde, *International Law* (2nd edn., 1947), vol. 1, p. 23; cf. pp. 127-9; cited in relation to Indonesia, Whiteman, *Digest*, vol. 1, pp. 223-4.

<sup>6</sup> Smith, *op. cit.* (above, n. 4), vol. 1, p. 18; cf. Brownlie, *Principles*, p. 80; Chen, *The International Law of Recognition*, p. 60. In *Hunt v. Gordon*, (1883) 2 N.Z.L.R. 160 at p. 186,

(iv) *Recognition*

As we have seen, recognition is not strictly a condition for statehood in international law.

An entity not recognized as a State but meeting the requirements for recognition has the rights of a State under international law in relation to a non-recognizing State . . .<sup>1</sup>

On the other hand, in some cases at least, States are not prohibited from recognizing or treating as a State an entity which for some reason does not qualify as a State under the general criteria discussed here. Such recognition may well be constitutive of legal obligation for the recognizing or acquiescing State; but it may also tend to consolidate a general legal status at that time precarious or *in statu nascendi*. Recognition, while in principle declaratory, may thus be of crucial importance in particular cases.<sup>2</sup> In any event, at least where the recognizing government is addressing itself to legal rather than purely political considerations, it is important evidence of legal status.<sup>3</sup>

(v) *Legal Order*

Since the modern State is the territorial basis for a legal order,<sup>4</sup> it might be thought that the existence of a 'legal order', or at least its basic rules, is a useful criterion for the existence of the State.

As a political organization, the state is a legal order. But not every legal order is a state. . . . The state is a relatively centralized legal order. . . . The legal order of primitive society and the general international law order are entirely decentralized coercive orders and therefore not states. . . . In traditional theory the state is composed of three elements, the people of the state, the territory of the state, and the so-called power of the state, exercised by an independent government. All three elements can be determined only juridically, that is, they can be comprehended only as the validity and the spheres of validity of a legal order.<sup>5</sup>

It is of course clear that 'legal order' is an important element of government, and hence an indication of statehood; but its status as a distinct criterion is open to doubt. Thus a revolutionary (that is, illegal) change of constitution does not necessarily affect the identity or continuity of the State.<sup>6</sup> Entities which, by all other criteria, are States, at the time they come into existence may have

Richmond J. declined to recognize a Samoan nationality on the ground that, although Samoa was recognized as independent, it was not recognized as a civilized Power 'capable of accepting a transfer of allegiance'. The Court of Appeal, affirming, relied rather on the absence of British recognition and of orderly government: *ibid.*, pp. 198-202, 267-8. To the same effect, *Hunt v. R.* (No. 2), (1882) 1 Fiji L.R. 59, at p. 63 *per* Gorrie C.J. (Samoa); *The Helena*, (1701) 4 C. Rob. 3, at pp. 5-7 *per* Sir Wm. Scott (the Barbary States).

<sup>1</sup> *Restatement (2nd), Foreign Relations Law of the United States* (1965), § 107; *supra*, pp. 103-6.

<sup>2</sup> e.g. in the cases of Taiwan (*supra*, p. 93 n. 9); the Vatican City (*supra*, p. 114 n. 5); the divided States (*supra*, p. 93 n. 2); and Andorra (*supra*, p. 129 n. 6). <sup>3</sup> Cf. *supra*, p. 106.

<sup>4</sup> D'Entrèves, *The Notion of the State* (1967), p. 96.

<sup>5</sup> Kelsen, *The Pure Theory of Law* (2nd edn., trans. Knight, 1964), pp. 286-7.

<sup>6</sup> *Supra*, p. 124 n. 2.

only rudimentary or fragmentary legal systems. In extreme cases, there may be no more than a diffused willingness to accept the system to be established by a Constituent Assembly.<sup>1</sup> Moreover a single State may well compose several interlocking legal systems, having a complex interrelationship and without the subordination of one to the other; this is the case with some federations. As a criterion, 'legal system' seems to be least helpful in just those cases for which the criteria exist.

Alternatively, it can be argued that, although 'legal system' as a whole may not be a useful criterion, the existence of a 'basic norm' within a State is both necessary and sufficient. Thus Marek finds it

both necessary and possible to define 'separateness' of the State in strictly legal terms: and in these terms it simply means that every State is determined by the basic norm of its legal order, which it does not share with any other State. This basic norm is its own; it is not, and cannot be, derived from any other State order. In other words, *the legal source, the reason of validity* of the legal order of a State cannot be found in the legal order of one or several other States. The legal order of a State cannot be delegated by any other State or group of States, for if it were, the entity in question would not be an independent State, but a component legal order of that State or group of States by whom it would be delegated.<sup>2</sup>

Nevertheless, as a separate criterion the 'basic norm' is no better. It is, as Marek points out, a purely formal notion, and as such, it fails in two distinct ways. First, it fails to explain the independence of a State whose basic norm was given to it by the legal system of another State. In such a case, formal and sometimes even municipal legal dependence may coexist with international independence. Equally, Marek is driven to reject, *a priori*, the statehood of 'internationalized territories' such as the Free City of Danzig—a position both too rigid, and inconsistent with practice.<sup>3</sup> Secondly, the basic norm can only explain the case of puppet States, with full formal but no actual validity, by an equivocation on the term 'reason for validity'. In such circumstances, the 'reason' appealed to is not formal but material, a conclusion of political fact in all the circumstances.

It follows that one can only know the basic norm of a State when the State itself is identified as such. Like international responsibility,<sup>4</sup> the basic norm is a conclusion to the problems of existence, identity and continuity, not the means of their solution. Nor can there be such a thing as an 'independent' basic norm,<sup>5</sup> but merely a basic norm of a State that is independent. Again, this is not to deny that the legal system of an entity is a part of its general system of government, and as such relevant to questions of existence, identity and continuity of statehood.<sup>6</sup>

<sup>1</sup> Austria in 1918 seems to be an example: Marek, *Identity and Continuity*, p. 202. The common phenomenon of continuity of law is not in point here.

<sup>2</sup> *Ibid.*, p. 168 (italics added). She none the less accepts that change in the basic norm *per se* does not change the State: *ibid.*, p. 188.

<sup>3</sup> Marek, *Identity and Continuity*, p. 168 n. 2; cf. *supra*, p. 139 n. 1.

<sup>4</sup> With which Marek compares it: *ibid.*, p. 189.

<sup>5</sup> *Ibid.*, p. 188.

<sup>6</sup> For similar criticism see Kamanda, *The Legal Status of Protectorates in Public International Law*, pp. 181-2.



## 5. CRITERIA FOR STATEHOOD AND OTHER PRINCIPLES OF INTERNATIONAL LAW

## 1. LEGALITY AND STATEHOOD

It has been seen that the traditional criteria for statehood were based almost entirely on the principle of effectiveness. The proposition that statehood is a question of fact derives strong support from this equation of effectiveness and statehood. In other words, although it is admitted that effectiveness in this context is a legal requirement, it is denied that there can exist legal criteria for statehood not based on effectiveness. In Charpentier's view:

les tentatives de développement de règles de légalité objective détachées de l'effectivité jointes à l'absence de sanctions capables de les faire respecter entraînent fatalement un *conflit entre le droit et le fait* dans lequel celui-là risque de l'emporter, constituant ainsi à lui seul un critère de validation de l'extension illégale des compétences.<sup>1</sup>

We must first distinguish two possible positions: that there can *a priori* exist no criteria for statehood independent of effectiveness, and that no such criteria exist as a matter of positive law. Clearly, if the former position be correct, there can be no inquiry into the effect of particular rules on status. That position thus requires examination.

The first point to be made is that, in recent practice, effective separate entities have existed which have, virtually universally, been agreed not to be States—in particular, Rhodesia and Formosa. Moreover, non-effective entities have also been generally regarded as being, or continuing to be, States: for example, Guinea-Bissau prior to Portuguese recognition,<sup>2</sup> and the various entities illegally annexed in the period 1936–40. The proposition that statehood must always be equated with effectiveness is not supported by modern practice. None the less, various arguments have been adduced in support of that view.

In the first place, it is argued that to apply rules of this type in the absence of an authoritative system of determination of status is quite impracticable. Since there will be no certainty as to the application of peremptory rules in this situation, in the absence of something like collectivization of recognition,<sup>3</sup> no such rules can be accepted. This is, of course, a variant of an argument which is central to the constitutive position in general:<sup>4</sup> the arguments which were adduced in that context are equally relevant here. No such compulsory procedure for determining disputed questions exists elsewhere in the law, and the view that statehood is, exceptionally, a matter requiring such certification has already been rejected. 'Collectivization of recognition' is no doubt desirable,<sup>5</sup>

<sup>1</sup> Charpentier, *op. cit.* (above, p. 94 n. 6), pp. 127–8 (his italics). Cf. Mouskhély, *Revue générale de droit international public*, 66 (1962), pp. 469–75, referring to 'les tentatives de réglementation juridique de la naissance des États'; Verhoeven, *Reconnaissance*, pp. 548–9, 589–91.

<sup>2</sup> *Post*, p. 168.

<sup>3</sup> Cf. Charpentier, *op. cit.* (above, p. 94 n. 6), p. 318.

<sup>4</sup> *Supra*, p. 101.

<sup>5</sup> Cf. Lauterpacht, *Recognition*, p. 78.

but since 1947 there has developed in United Nations practice and elsewhere a system of certification which has in substance fulfilled the function of collectivization, without the attribute of complete and binding certainty.<sup>1</sup>

A second argument is that international law risks being ineffective and creating a 'fatal conflict between law and fact', if it challenges the validity of effective situations, especially situations of power such as the existence of States. But the question is exactly whether the term 'State' should be regarded as for all purposes and in all cases equivalent to certain situations of power. It could be said that international law risks being ineffective precisely if it does not challenge effective but illegal situations. For example, the Rhodesian situation is probably, because of the general non-recognition of an effective situation, closer to solution than it would otherwise have been. That non-recognition is, it seems, both obligatory and a result of lack of status of the entity in question.<sup>2</sup> Of course, effectiveness remains the dominant *general* principle, but it is quite consistent with this that there should exist specific, limited, exceptions based on other fundamental principles.

A further, more persuasive, argument relates to the difficulty of applying the rule of extinctive prescription to a situation where law and fact conflict for a long period of time. None the less, this difficulty arises most acutely in the area where the continued acceptance of non-effective legal entities is most clearly demonstrated: that is, in the area of the non-extinction of States by illegal annexation. The application of the doctrine of extinctive prescription in this area causes difficulties, but they have not been regarded as insurmountable. It is sufficient to say here that the same problems of application occur in other contexts (for example, acquisition and loss of territory), and that this difficulty ought not to prevent a proper study of established practice.

It may also be argued that, if international law withholds legal status from effective illegal entities, the result is a legal vacuum undesirable both in practice and principle. But this assumes that international law does not apply to *de facto* illegal entities; and this is simply not so. Relevant international legal rules can apply to *de facto* situations here as elsewhere. For example, Formosa, whether or not a State, is not free to act contrary to international law, nor does it claim such a liberty. The process of analogy from legal rules applicable to States is quite capable of providing a body of rules applicable to non-State entities. The argument that no such rules apply smacks of the old view that international law can only apply to States.

Fundamentally, the argument that international law cannot regulate or control effective territorial entities is an expression of the view that international law cannot regulate power politics at all; that it is, essentially, non-peremptory. But, on its own terms and with whatever results, international law is undoubtedly in a stage of development towards greater coherence. In the present context, an important recent development has been the acceptance of the notion of *jus cogens*; that is, of relatively imprescriptible and peremptory international

<sup>1</sup> Briggs, *Proceedings of the American Society of International Law*, 44 (1950), pp. 169-81.

<sup>2</sup> *Post*, pp. 162-4.



legal rules. This development, and its possible relevance to questions of statehood, must now be considered.

(i) *Jus cogens in modern international law*

The existence of a hierarchy of international law rules has long been posited; but to avoid confusion certain preliminary distinctions must be made. There are rules which are preconditions for meaningful international activity—for example, *pacta sunt servanda*. To abrogate that rule is not possible: a treaty providing that *pacta sunt servanda* is mere reaffirmation; a treaty denying it is an absurdity. The point is that the very activity of treaty-making assumes the general rule. Equally, a treaty abolishing States (without providing for their replacement by other governmental forms) would be meaningless, because the activity of international relations as at present carried on assumes States as the basic international units. It follows that, in discussing the problem of *jus cogens*, we are concerned only with what may be called substantive, not with structural, rules.<sup>1</sup> It also follows that the problem of *jus cogens* is the problem of restrictions upon the possible freedom of action of States, not of limitations upon some absolute liberty that States have never had. Thus the proposition that States are in principle free to make whatever treaties they like is too absolute; rather, States are in principle free to make whatever provision they like concerning their own rights (or, in general, concerning the rights of their nationals). The *pacta tertiis* rule has nothing to do with *jus cogens*: States simply do not have, in the absence of consent, the competence to deprive other States of their legal rights by way of treaty. A treaty attempting to impose duties on third States is not void—as is a treaty in violation of a *jus cogens* norm. It merely provides a possible set of rules which are, in the absence of the consent of the State or States affected, non-opposable.<sup>2</sup> So the principle of consent is a further, structural, principle of international law, distinct from *jus cogens*.

The problem is whether the principle of State autonomy as enunciated admits of exceptions. Modern opinion, though not quite unanimous,<sup>3</sup> is substantially in favour of *jus cogens*, which may be said to have received its *imprimatur* in the text of the Vienna Convention. Article 53 provides that:

A treaty is void, if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.<sup>4</sup>

<sup>1</sup> Cf. (to the same effect) Verdross, *American Journal of International Law*, 60 (1966), p. 55 at pp. 58–9; Scheuner, *Zeitschrift für Völkerrecht*, 27 (1967), pp. 520–32 at p. 525.

<sup>2</sup> Vienna Convention on the Law of Treaties (1969), Art. 34.

<sup>3</sup> At the Vienna Conference only Liechtenstein opposed the notion outright. Among writers Schwarzenberger is notable for his opposition: *Texas Law Review*, 43 (1965), pp. 455–78; but cf. his *International Law*, vol. 1, pp. 425–7. Cf. also Sztucki, *Jus Cogens and the Vienna Convention on the Law of Treaties* (1974), for a full account.

<sup>4</sup> Arts. 65–6 provide for judicial settlement of disputes concerning, *inter alia*, Art. 53. The



*Jus cogens* is thus well established, but the content of the category is less well settled, and despite last-minute redrafting, Article 53 is of little help, being quite circular.<sup>1</sup> Nevertheless the extent of disagreement over the content of *jus cogens* can be exaggerated, and it may well be that in practice courts will have less difficulty in applying the rule than might have been thought.<sup>2</sup> Scheuner suggests three categories of *jus cogens*: first, rules protecting the foundations of international order, such as the prohibition of genocide or of the use of force in international relations except in self-defence; secondly, rules concerning peaceful co-operation in the protection of common interests, such as freedom of the seas; and thirdly, rules protecting the most fundamental and basic human rights, and, one might add, the basic rules for the protection of civilians in time of war. At least the first and third of these would appear to be genuine *jus cogens* norms. On the other hand, some suggested candidates are much less certain: the invalidity of unequal treaties,<sup>3</sup> and self-determination,<sup>4</sup> are both controversial even as *jus dispositivum*: the suggestion that they constitute *jus cogens* rules is difficult to accept.<sup>5</sup>

These few rules then have a special character in modern international law. Treaties in conflict with them are void,<sup>6</sup> and pre-existing treaties are annulled when *jus cogens* norms inconsistent with them come into existence.<sup>7</sup> But the question arises whether *jus cogens* norms invalidate situations other than treaties.

## (ii) *Legal effects of jus cogens on acts or situations other than treaties*

It may be suggested that *jus cogens* norms must invalidate not just treaties but all legal acts and situations inconsistent with them. This goes beyond the terms of the Vienna Convention itself, although as a codification of treaty law it was arguably outside its province to go further. But Article 53 does state that 'no derogation is permitted' from *jus cogens* norms, and this language seems to be sufficiently wide to include acts other than treaties. It is difficult to accept that a rule should be sacrosanct in one context and freely prescriptible in another. But it must be admitted that *jus cogens*, which was designed to deal with problems of the validity of treaties, is acutely difficult to apply to problems of territorial status.<sup>8</sup> In these latter cases, the question must be whether the illegality is so

Convention is not yet in force. For the *travaux préparatoires* see Rosenne, *The Law of Treaties* (1970), pp. 290-3.

<sup>1</sup> Rousseau, *Droit international public*, vol. 1, pp. 149-51; de Visscher, *Revue générale de droit international public*, 75 (1971), pp. 5-11 at p. 7.

<sup>2</sup> Cf. Schwelb, *American Journal of International Law*, 61 (1967), pp. 946-75; Reisenfeld, *ibid.*, 60 (1966), pp. 511-15.

<sup>3</sup> Judge Ammoun, *Barcelona Traction (Second Phase)*, *I.C.J. Reports*, 1970, p. 3, at p. 304.

<sup>4</sup> *Ibid.*, and Scheuner, *loc. cit.* (above, p. 146 n. 1) at p. 525, both referring (erroneously) to Brownlie, *Principles* (1st edn.), pp. 75, 412; cf. *ibid.* (2nd edn.), p. 500 n. 4. See also Bedjaoui, *I.L.C. Yearbook*, 1975-I, p. 48.

<sup>5</sup> Self-determination may, however, be protected by the *pacta tertiis* rule.

<sup>6</sup> Vienna Convention, Art. 53; cf. *Foreign Relations of the United States*, 1946-VIII, pp. 1082-3 (France). <sup>7</sup> Vienna Convention, Art. 69. There is no severance: Art. 44 (5).

<sup>8</sup> Scheuner, *loc. cit.* (above, p. 146 n. 1), p. 525 n. On different grounds, Marek, *Guggenheim Festschrift* (1968), p. 426 at pp. 439-41.

central to the existence or extinction of the entity in question that international law may justifiably, and exceptionally, treat an effective entity as not a State (or a non-effective entity as continuing to be a State). Arguably a rule which was *jus dispositivum* in the context of treaties might yet be sufficiently relevant and important to be regarded as a criterion for statehood. However, *jus cogens* would still be relevant here in two ways. That a particular rule is one of *jus cogens* must be relevant in determining whether illegality under that rule is such as to warrant refusing to accept the statehood of the entity created in breach of the rule. And that the rule violated is one of *jus cogens* would be relevant in applying the principle of extinctive prescription.

(iii) *Legality and statehood: some tentative conclusions*

It has been argued that there is nothing *a priori* incoherent about the legal regulation of statehood on a basis other than that of effectiveness. And, although this has been denied,<sup>1</sup> there is a considerable amount of practice supporting regulations of this type. This position was foreshadowed by Lauterpacht in 1948:

International law acknowledges as a source of rights and obligations such facts and situations as are not the result of acts which it prohibits and stigmatizes as unlawful. . . . It follows from the same principle that facts, however undisputed, which are the result of conduct violative of international law cannot claim the same right to be incorporated automatically as part of the law of nations . . .<sup>2</sup>

Thirty years later, it can be argued that other principles unrelated to effectiveness may be relevant.<sup>3</sup> No doubt the principle of effectiveness remains the dominant criterion, but practice does not support the view that it is the only one. On the other hand, although international practice has developed the formal concept of *jus cogens*, that concept, at least as elaborated in the Vienna Convention, is not the key to the inquiry. The provisions of the Convention relating to *jus cogens* do not have and were not intended to have direct application to situations involving the creation of States. Their importance is rather indirect, as has been said: the emphasis is on the centrality and permanence of certain basic rules. In the context of statehood, what is necessary is not reliance upon the provisions of the Vienna Convention,<sup>4</sup> but an examination of rules specifically adapted to the context.

Finally, three different problems must be distinguished: illegality as affecting the creation of a State; illegality as affecting the title of its government to represent it, and illegality as affecting its termination. Different considerations may apply in each case, and only the first problem will be dealt with in detail here.<sup>5</sup>

<sup>1</sup> Charpentier, *op. cit.* (above, p. 94 n. 6), pp. 127-8; Chen, *The International Law of Recognition*, p. 54. Cf. Verhoeven, *Reconnaissance*, pp. 607-17.

<sup>2</sup> Lauterpacht, *Recognition*, pp. 409-10; cf. *ibid.*, pp. 285, 340-1.

<sup>3</sup> Cf. Eekelaar, in Simpson (ed.), *Oxford Essays in Jurisprudence* (2nd ser., 1973), p. 22 at pp. 39-40; Brownlie, *Principles*, pp. 82-3; Reuter, *I.L.C. Yearbook*, 1975-I, p. 45.

<sup>4</sup> But see Bokor-Szegö, *New States in International Law* (1970), pp. 66-75.

<sup>5</sup> For illegality and extinction of States see *post*, pp. 173-6. Illegality and governmental representation is a topic on which practice is, to say the least, scanty. It is outside the scope of this study.



## 2. STATEHOOD AND SELF-DETERMINATION

The relationship between statehood and self-determination is an important, and to some extent a neglected, problem. Although there is a substantial body of practice, it remains to be seen whether self-determination as such has become a criterion of statehood.

(i) *Self-determination in modern international law*

Strictly speaking, discussion of the legal status of self-determination is preliminary to rather than an integral step in the present argument: however, the problem is sufficiently important and controversial to warrant at least some treatment here. Indeed there has probably been since 1945 no more divisive issue among writers (at least in the Western tradition of international law) than the question whether there exists a legal right or principle of 'self-determination of peoples'. If such a principle does exist, it is certainly of recent origin. The Commission of Jurists in the *Aaland Islands* case thought that the principle was not part of general international law,<sup>1</sup> although it is of interest that, in the unsettled and precarious situation of Finland in 1918–20<sup>2</sup> they thought that the principle did operate to preclude the *Aaland Islands* question from being a matter within the domestic jurisdiction of Finland.<sup>3</sup> That view was accepted by the Council of the League.<sup>4</sup> Nearly sixty years later a vast literature and at least two<sup>5</sup> advisory opinions of the International Court have failed to settle the matter; indeed, the intensity of the dispute might lead one to suppose a failure on each side to analyse with sufficient care the opposing positions. In this respect two preliminary distinctions may be of assistance.

In the first place it is necessary to distinguish clearly the political principle or value of self-determination from the putative legal right or principle. The former, as a principle of general application, has had a place in democratic thought since at least 1789, and has at particular periods (most notably 1917–20) assumed great prominence in international affairs.<sup>6</sup> The latter is of much more recent origin, and applies as of right (if at all) only to a restricted category of cases.<sup>7</sup> The weight sometimes accorded the political principle of self-determination has no doubt contributed, at least to some degree, to the body of practice to be examined here; but this general ideal is too vague and ill-defined to constitute a legal principle, much less a positive legal rule applying of its own force to particular 'peoples' or to 'peoples' in general. Yet it is sometimes assumed

<sup>1</sup> *League of Nations Official Journal*, Special Supplement No. 3 at pp. 5–6; cf. Report of the Committee of Rapporteurs, L.N. Doc. B7/21/68/106 [vii], at pp. 27–8.

<sup>2</sup> Cf. *supra*, pp. 117–18.

<sup>3</sup> Loc. cit. (above, n. 1).

<sup>4</sup> For Fisher's proposal accepting the report (adopted without dissent), see *League of Nations Official Journal*, October 1920, p. 395. See also Barros, *The Aaland Islands Question* (1968).

<sup>5</sup> *Post*, pp. 157–9. The issue was avoided, not very felicitously, in the *Right of Passage* case, *I.C.J. Reports*, 1960, p. 6.

<sup>6</sup> See e.g., Cobban, *The Nation State and National Self-Determination* (rev. edn., 1969). For Soviet practice in this period see Carr, *The Bolshevik Revolution 1917–1923* (1950), pp. 414–35. The term was also given currency by President Wilson: see Hackworth, *Digest*, vol. 1, pp. 422–5. It is implicit in the Fourteen Points, and was included in the first American draft for the Covenant, though it was subsequently deleted.

<sup>7</sup> *Post*, p. 160.



that proponents of a legal right or principle of self-determination are committed to just this view of the ambit of the right or principle. The distinction is the same as that between the general political value of 'sovereignty' which is often claimed to inhere in a particular group or polity, and the legal notion or principle of sovereignty, which has, as we have seen,<sup>1</sup> a considerably more restricted scope.

This comparison leads to the second point: there is a clear but not always articulated distinction between the identification of territories to which the legal principle of sovereignty applies, and the legal consequences of that principle in its application to territories already determined. In the present stage of development of international law, 'sovereignty' applies as a legal right (or more properly, a legal presumption) only to territories constituted or accepted as States under the criteria discussed here.<sup>2</sup> It is for that reason that we speak of a *principle* of sovereignty; since the notion of a right presupposes identification of the subject of the right, and that identification must be made *aliunde* the principle of sovereignty.<sup>3</sup> Moreover it might be the case that the territories to be regarded as 'sovereign' would be determined in practice by political rather than legal considerations; and yet the consequences of the principle in its application to the territories so determined would be legal. This was Oppenheim's view of the sovereignty of States: sovereignty was a legal principle applying to entities identified by the purely political act of recognition.<sup>4</sup> A legal principle of self-determination would present an almost exact analogy. In practice since 1945 there has been a considerable elaboration of the legal consequences of the principle of self-determination for particular territories; but the question of the ambit of self-determination, the territories to which it applies, has at least arguably remained as much a matter of politics as of law. In any discussion of the problem this distinction must be carefully observed.

(a) *The principle of self-determination in the United Nations Charter.* The Charter twice mentions self-determination expressly: in Article 1 (2), where one of the 'purposes of the United Nations' is stated to be the development of 'friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples', and in Article 55, where the same formula is used to express the general aims of the United Nations in the fields of social and economic development and respect for human rights. By elaborating these rather cryptic references, the General Assembly has attempted in a very large number of resolutions to define more precisely the content of the principle. Thus, the Colonial Declaration (clause 2) stated that

All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.<sup>5</sup>

<sup>1</sup> *Supra*, pp. 107-10.

<sup>2</sup> But cf. Arangio-Ruiz (*supra*, p. 94 n. 2); Seyersted, *Acta Scandinavica*, 34 (1964), pp. 3-112.

<sup>3</sup> The problem of determining the territories to which self-determination applies is thus very similar to the problem of determining the criteria for statehood.

<sup>4</sup> *Supra*, pp. 98-9.

<sup>5</sup> G.A. Res. 1514 (XV), 14 December 1960 (89-0:9), 'Declaration on the Granting of

The principle has also been reaffirmed by the Security Council, for example by Resolution 183 of 11 December 1963, by ten votes to none with one abstention.<sup>1</sup> The status of self-determination as a 'fundamental obligation' was further emphasized by its being linked with the 'prohibition of the threat or use of force in international relations' in Resolution 2160 (XXI), which reaffirmed that

(b) Any forcible action, direct or indirect, which deprives peoples under foreign domination of their right to self-determination and freedom and independence and of their right to determine freely their political status and pursue their economic, social and cultural development constitutes a violation of the Charter of the United Nations. Accordingly, the use of force to deprive peoples of their national identity, as prohibited by the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty contained in General Assembly Resolution 2131 (XX), constitutes a violation of their inalienable rights and of the principle of non-intervention.<sup>2</sup>

And in its Declaration of Principles annexed to Resolution 2625 (XXV), the Assembly dealt in the following terms with 'The principle of equal rights and self-determination of peoples':

By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter . . . all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter . . .

The territory of a colony or other non-self-governing territory has, under the 'Charter, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or non-self-governing territory have exercised their right of self-determination in accordance with the Charter. . . . Every State shall refrain from any action aimed at the partial or total disruption of the national unity or territorial integrity of any other State or country.<sup>3</sup>

However, one difficulty that arises here is that the General Assembly has no general law-making capacity. Resolutions, with certain limited exceptions, have only recommendatory force, and the Assembly has no capacity to impose new customary legal obligations on States.<sup>4</sup> Of course, the Assembly undoubtedly has some measure of discretion as to the way in which, for its purposes, it carries out its interpretative functions. But the resolutions cited do not seem to be interpretations of the Charter as such (or if they are so, are so only to a limited degree). The Charter mentions self-determination only twice, and in

Independence to Colonial Countries and Peoples'. For the status of the 'Colonial Declaration' see Asamoah, *The Legal Significance of the Declarations of the General Assembly* (1966), pp. 164-73. See also G.A. Resns. 1541 (XV); 2105 (XX); 2200A (XXI); 2625 (XXV), Annex.

<sup>1</sup> Other more recent examples include S.C. Resns. 301 (1971) (Namibia); 377 (1975) (Western Sahara); 384 (1975) (Portuguese Timor).

<sup>2</sup> 30 November 1966 (98-2:8).

<sup>3</sup> 24 October 1970 (adopted without vote); see McWhinney, *American Journal of International Law*, 60 (1966), pp. 1-33.

<sup>4</sup> See the authorities cited *infra*, p. 152 n. 4.



both cases it seems to mean something rather different from the usual understanding of 'self-determination'. That term has in fact two quite distinct meanings. It can mean the sovereign equality of existing States, and in particular the right of a State to choose its own form of government without intervention. It can also mean the right of a specific territory ('people') to choose its own form of government irrespective of the wishes of the rest of the State of which that territory is a part. Traditional international law recognized the first but not the second of these, from which it is said that it did not recognize the right of self-determination.<sup>1</sup> The Charter, in referring as it does to 'equal rights and self-determination' in Articles 1 (2) and 55, seems at least primarily to be referring to self-determination also in this first and uncontroversial sense.<sup>2</sup> Self-determination in the second sense is not mentioned, though it is implicit in Articles 73 (b) and 76 (b). In proclaiming a general right of self-determination, and in particular of immediate self-determination, the resolutions cited go beyond the terms of the Charter however liberally construed.

This does not, however, foreclose the status of self-determination as a matter of customary international law. State practice is just as much State practice when it occurs in the 'parliamentary' context of the General Assembly as in more traditional diplomatic forms. The practice of States in assenting to and acting upon law-declaring resolutions may be of considerable probative importance, in particular where that practice achieves reasonable consistency over a period of time. Where a resolution is passed by 'a large majority of States with the intention of creating a new binding rule of law'<sup>3</sup> and is acted upon as such by States generally, then that action will have what can properly be called a quasi-legislative effect. The problem, as always, is one of evidence and assessment.<sup>4</sup> But, as we have seen, such an assessment requires two distinct inquiries: whether there exist any criteria for the determination of territories to which a 'right of self-determination' is to be accorded; and whether, in its application to those territories, self-determination can properly be regarded as a legal right, and if so, to what effect. To these questions we must now turn.

(b) *Identifying the unit of self-determination: the problem of criteria.* It is a peculiarity of this area of practice that it is possible to be more certain about the 'consequences' of self-determination than about the criteria for the territories to which the principle is regarded as applying. Much of the emphasis, in practice, has been on the application of the principle to territories to which it had come

<sup>1</sup> See Parry, in Sørensen (ed.), *Manual of Public International Law* (1968), p. 1 at pp. 19-20.

<sup>2</sup> Cf. *United Nations Conference on International Organization*, vol. 6, p. 955; Kaur, *Indian Journal of International Law*, 10 (1970), pp. 479-502.

<sup>3</sup> *Fisheries Jurisdiction case (Second Phase)*, *I.C.J. Reports*, 1974 p. 3, at p. 162 (Judge Petráň).

<sup>4</sup> See further, Castañeda, *The Legal Significance of Resolutions of United Nations Organs* (1969), pp. 120-1; Higgins, *Development*, pp. 1-10; Falk, *American Journal of International Law*, 60 (1966), pp. 782-91; Onuf, *ibid.*, 64 (1970), pp. 349-55; Johnson, *this Year Book*, 32 (1955-6), pp. 97-122; Sloan, *ibid.*, 25 (1948), pp. 1-33; Judge Tanaka, dissenting, *South West Africa cases (Second Phase)*, *I.C.J. Reports*, 1966, p. 6, at pp. 291-3. For a stricter view see Judge Fitzmaurice, dissenting, *Namibia opinion*, *I.C.J. Reports*, 1971, p. 6, at pp. 280-1, and in *Institut du Droit International, Livre du Centenaire* (1973), pp. 268-71. Cf. Judge Lauterpacht, separate opinion, *Voting Procedure case*, *I.C.J. Reports*, 1955, p. 67 at p. 116.



to apply either by a form of recognition or by agreement pursuant to conventional arrangements. The effect of this practice has been to elaborate sometimes cryptic references to the principle in the constituent documents, acting in some ways as a form of administrative law of the institutions in question. These institutions should first be mentioned.

(1) *The Mandate and Trusteeship systems.* The Mandate system, established by the Principal Allied and Associated Powers in conjunction with the League of Nations under Article 22 of the Covenant,<sup>1</sup> was replaced after the Second World War by the International Trusteeship System under Chapters XII and XIII of the Charter.<sup>2</sup> The two systems had the same general aims: in particular, encouragement of the 'well-being and development' of the peoples of the various territories, and of their 'progressive development towards self-government or independence',<sup>3</sup> although this second aim was only implicit in the Covenant. Both accepted the principle of the international accountability of the administering State for carrying out these aims, 'securities for performance' being provided in the Covenant and the Charter, and in the various individual agreements. The systems thus constituted a rejection of annexation of former German, Turkish and Italian territories, and the assertion of international interest at a much earlier stage in the process towards independence than international law at the time otherwise allowed.<sup>4</sup> In particular, the principle of self-determination, as the International Court has twice explicitly affirmed,<sup>5</sup> was made applicable to Mandates and Trust Territories, which constitute, as it were, the primary type of self-determination territory.<sup>6</sup>

(2) *Non-self-governing territories: Chapter XI of the Charter.* A more significant extension of the principle, certainly in retrospect, was brought about in Chapter XI of the Charter, which applies to 'territories whose peoples have not yet attained a full measure of self-government'. Chapter XI was the result of a compromise between those seeking an extension of the Trusteeship system to all 'colonial' territories, and those resisting such change.<sup>7</sup> The result was an acceptance, in more or less the same terms, of the substantive obligations of the Mandate and Trusteeship systems—acceptance in particular of 'the

<sup>1</sup> For details see Temperley (ed.), *A History of The Peace Conference at Paris* (1924), vol. 6, pp. 500–23.

<sup>2</sup> The literature on Mandates and Trust Territories is voluminous. See especially Wright, *Mandates under the League of Nations* (1930); Toussaint, *The Trusteeship System of the United Nations* (1956); Thullen, *Problems of the Trusteeship System* (1964); Duncan Hall, *Mandates, Dependencies and Trusteeship* (1948); Veicopoulos, *Traité des territoires dépendantes* (1960, 1971, 2 vols.); Chowdhuri, *International Mandates and Trusteeship Systems: A Comparative Study* (1955).

<sup>3</sup> Charter, Art. 76(b).

<sup>4</sup> *Status of South West Africa* opinion, *I.C.J. Reports*, 1950, p. 128 at p. 131.

<sup>5</sup> *Post*, pp. 157–9.

<sup>6</sup> There were in all fifteen Mandated territories. 'A' Mandates became independent as follows: Iraq (1932), Syria and Lebanon (1944), Jordan (1946). The Palestine Mandate was terminated in 1947. All other Mandated territories except South West Africa were transferred to the Trusteeship system. Only one further territory (Italian Somaliland) was added to the Trusteeship system. All Trust Territories have now reached 'independence or self-government' except the Strategic Trust Territory of the Pacific Islands. See further Marston, *International and Comparative Law Quarterly*, 18 (1968), pp. 1–40.

<sup>7</sup> Cf. Russell and Muther, *A History of the United Nations Charter* (1958), pp. 813–24.

principle that the interests of the inhabitants of these territories are paramount', and of an obligation 'to develop self-government'<sup>1</sup>—but with a much more attenuated form of international accountability.<sup>2</sup> In practice Chapter XI of the Charter has been subjected to a pronounced form of 'progressive interpretation'. In the *Namibia* opinion the Court stated that

the concepts embodied in Article 22 of the Covenant were not static but were by definition evolutionary, as also therefore was the concept of the sacred trust. . . .

The parties to the Covenant must consequently be deemed to have accepted them as such. That is why, viewing the institutions of 1919, the Court must take into consideration the changes which have occurred in the supervening half century, and its interpretation cannot remain unfettered by the subsequent development of law, through the Charter of the United Nations and by way of customary law. . . .<sup>3</sup>

This may be regarded as equally true of Article 73 of the Charter, based as it is on Article 22 of the Covenant; and indeed the Court explicitly affirmed the applicability of self-determination to non-self-governing territories under the Charter.<sup>4</sup> In the *Western Sahara* case, after referring to this passage, the majority opinion reaffirmed 'the validity of the principle of self-determination':<sup>5</sup> in its view, Spain, as an administering power, 'has not objected, and could not validly object, to the General Assembly's exercise of its powers to deal with the decolonization of a non-self-governing territory . . .'.<sup>6</sup> Thus the 'right of [the Spanish Sahara] population to self-determination' was 'a basic assumption of the questions put to the Court'.<sup>7</sup> The Court's reply to those questions, equally, was based upon 'existing rules of international law'.<sup>8</sup>

In fact a considerable majority of non-self-governing territories have achieved self-government in some form or other.<sup>9</sup>

<sup>1</sup> Charter, Art. 73. Reference is also made to the 'sacred trust', in language borrowed from Article 22 of the Covenant. On the controversy at San Francisco about inclusion of 'independence' in Ch. XI, see Russell and Muther, *op. cit.* (previous note), p. 815; *United Nations Conference on International Organization*, vol. 10, pp. 677–8.

<sup>2</sup> The only form of accountability provided for is in Art. 73(e); an obligation 'to transmit regularly, for information purposes, subject to such limitation as security and constitutional considerations may require, statistical and other information of a technical nature relating to economic, social, and educational conditions . . .'. No provision was made for petitions from or visits to Chapter XI territories, in contrast with Trust Territories (Art. 87 (b), (c)). However in practice something like a right of petition has developed: e.g. *Repertory of Practice of United Nations Organs*, Supplement No. 3, vol. 3, pp. 62–5; as well as a system of 'visiting missions' to territories, with the consent of the administering State: *ibid.*, pp. 59–62. See further Barbier, *Le Comité de Décolonisation des Nations-Unies* (1974), pp. 190–8.

<sup>3</sup> *I.C.J. Reports*, 1971, p. 16 at p. 31.

<sup>4</sup> *Ibid.*, cited *post*, pp. 157–8.

<sup>5</sup> *I.C.J. Reports*, 1975, p. 12, at p. 33. The court referred to Res. 1514 (XV) as providing 'the basis for the process of decolonization which has resulted since 1960 in the creation of many States which are today Members of the United Nations'; *ibid.*, p. 32. For comment on the Opinion see Barbier, *Revue juridique et politique indépendance et coopération*, 30 (1976), pp. 67–103; Janis, *Harvard International Law Journal*, 17 (1976), pp. 609–22; Prévost, *Journal de droit international*, 103 (1976), pp. 831–62; Flory, *Annuaire français de droit international*, 1975, pp. 253–77.

<sup>6</sup> *I.C.J. Reports*, 1975, p. 12 at p. 23 (emphasis added).

<sup>7</sup> *Ibid.*, p. 36.

<sup>8</sup> *Ibid.*, pp. 30, 37.

<sup>9</sup> About four-fifths of approximately 100 Chapter XI territories in the period 1945–76 achieved



(3) *Other cases of application of the principle to particular territorial disputes or situations.* Finally, in quite a number of cases the principle of self-determination has been adopted by the parties as a criterion for settlement of a particular dispute or issue; for example, the use of plebiscites in determining boundaries.<sup>1</sup>

It will be seen that in each of these cases the problem of identification has been solved in practice by processes of express agreement or, at least, acquiescence. Indeed for categories I and III this was necessarily so.<sup>2</sup> Early practice pursuant to Chapter XI of the Charter, which appears to apply to defined territories irrespective of the consent of the Members administering them, was also quasi-conventional in nature: Member States were asked to list territories to which, in their own assessment, Chapter XI applied, and no general examination has been made of the appropriateness or otherwise of their responses.<sup>3</sup> However, practice since 1946, though predicated on a narrow interpretation of the term 'territories whose peoples have not yet attained a full measure of self-government',<sup>4</sup> has been rather more searching; it is to this practice that one must look to find even rudimentary criteria for self-determination territories.

Thus the General Assembly listed, after some years of study,<sup>5</sup> 'Principles which should guide Members in determining whether or not an obligation exists to transmit information called for under Article 73 (e) of the Charter'.<sup>6</sup> Pursuant to those principles, the Assembly has on several occasions 'determined' that particular territories did qualify as territories to which Chapter XI applied, whether with<sup>7</sup> or without<sup>8</sup> the approval of the Member State administering

self-government in one form or another. See further Rigo Sureda, *The Evolution of the Right of Self-Determination* (1973); Sud, *The United Nations and Non-Self-Governing Territories* (1965); Ahmad, *The United Nations and the Colonies* (1974); El-Ayouty, *The United Nations and Decolonization. The Role of Afro-Asia* (1971); Rajan, *The United Nations and Domestic Jurisdiction* (2nd edn., 1961), pp. 133-222; Barbier, *op. cit.* (above, p. 154 n. 2); Nawaz, *Indian Yearbook of International Affairs*, 11 (1962), pp. 3-47; van Asbeck, *Recueil des cours*, 71 (1947), pp. 345-472.

<sup>1</sup> Cf. Bowett, *Proceedings of the American Society of International Law*, 60 (1966), p. 129 at pp. 130-1. See further the works cited *post*, p. 160 n. 3.

<sup>2</sup> Thus Charter, Art. 77 (2) made it clear that there was no automatic transfer of territories from Mandate to Trusteeship, and the International Court held that there was no obligation to negotiate Trusteeship agreements: *Status of South West Africa* opinion, *I.C.J. Reports*, 1950, p. 128 at pp. 139-40; cf. Judge de Visscher at pp. 187-90. Art. 77 (1) (c) provided for other territories to be 'voluntarily placed' under the system by States responsible for their administration: there have been no such territories.

<sup>3</sup> Cf. G.A. Resns. 9 (I), 9 February 1946; 66 (I), 13 December 1946 (listing seventy-four territories under eight administering States). The only objections were made by States (sc., Guatemala, Panama, Argentina) with claims to certain of the territories.

<sup>4</sup> Thus G.A. Res. 1541 (XV), Annex, Principle I ('territories, known as colonies at the time of the passing of the Charter'). Cf. Nawaz, *Indian Yearbook of International Affairs*, 11 (1962), p. 3 at p. 13.

<sup>5</sup> Cf. G.A. Resns. 567 (VI), 18 January 1952; 648 (VII), 10 December 1952; 742 (VIII), 27 November 1953.

<sup>6</sup> G.A. Res. 1541 (XV), Annex, 15 December 1960 (69-2:21).

<sup>7</sup> In the case of the Spanish territories: G.A. Res. 1542 (XV), 15 December 1960 (68-6:17); *Repertory of Practice of United Nations Organs*, Suppl. 3, vol. 3, pp. 11-13.

<sup>8</sup> In the cases of the nine Portuguese territories listed in G.A. Res. 1542 (XV), para. 1; *ibid.*, vol. 3, Art. 73, paras. 105-29; Wohlgemuth, *International Conciliation*, No. 545 (November



the territory in question. Other suggestions to the same effect have been made.<sup>1</sup>

These excursions would seem to have been amply justified by the terms of Chapter XI, which is not expressed to depend on the consent of particular administering powers; but the absence of any more peremptory<sup>2</sup> or thorough delimitation of non-self-governing territories remains significant. Although there may be room for criticism of the General Assembly's record in this area, it may also be that the criticism should be directed at the relatively restrictive definition of 'non-self-governing territories' which has been adopted: that definition (at least as elaborated in Resolution 1541 (XV)) refers exclusively to the notion of 'colonial territories' in 1945,<sup>3</sup> despite the fact that Chapter XI itself expressly includes after-acquired territories. But, given that definition, it is the case that (small islands apart) virtually all the territories which would, under the twin criteria of geographical separateness and political subordination, have qualified as non-self-governing have been treated as such, at least for a time. It is also significant that the principle of self-determination has continued to be regarded as relevant to those territories even when they were no longer reported on under Article 73 (e).<sup>4</sup>

(c) *The consequences of self-determination.* Where a territory is subjected to a particular regime predicated upon the principle of self-determination, the consequences of that subjection have of course been defined in the first place in the instruments themselves. The effect of subsequent practice has none the less been marked: the principle of self-determination has been regarded as having a number of significant legal effects on the institutions or territories in question. Only a brief and summary statement is possible here, but the following examples may be given.

It is arguable that traditional rules relating to the use of force and to neutrality in armed conflicts between a metropolitan or administering State and indigenous forces in a non-self-governing territory have been modified, even modified substantially.<sup>5</sup> Despite significant qualifications in the original instruments, the principle of self-determination has come to be regarded as dominant.<sup>6</sup> A most striking example is the case of 'C' Mandates, such as South West Africa: the

1963); and of Southern Rhodesia: G.A. Res. 1747 (XVI), 28 June 1962 (73-1:27), 2 n.p.). Cf. *British Practice in International Law*, 1962, pp. 103-9, 111-12, 248-56; Dugard, *Acta Juridica*, 1973, pp. 46-54.

<sup>1</sup> For Bangladesh see *post*, pp. 171-2. In the *Namibia* opinion, Judge Fitzmaurice stated that 'on any view S.W. Africa is a non-self-governing territory' under Chapter XI of the Charter: *I.C.J. Reports*, 1971, p. 6 at p. 296.

<sup>2</sup> The Annex to G.A. Res. 1541 (XV) refers to 'Principles which should guide Members . . .'. The Assembly's role is treated, at best, as secondary.

<sup>3</sup> *Supra*, p. 155 n. 4. The *travaux* are not so emphatic: *United Nations Conference on International Organization*, vol. 6, p. 296; *ibid.*, vol. 10, pp. 495-8.

<sup>4</sup> Whether because the principle of self-determination is written into the arrangements for self-government, as with Puerto Rico, or otherwise. As to the former see Reisman, *Puerto Rico and the International Process. New Roles in Association* (1975); Cabrañes, *International and Comparative Law Quarterly*, 16 (1967), pp. 531-9; Whiteman, *Digest*, vol. 1, p. 400.

<sup>5</sup> *Post*, pp. 166-72.

<sup>6</sup> Cf. *Namibia* opinion, *I.C.J. Reports*, 1971, p. 6 at p. 31; *post*, p. 158.

'C' Mandate was regarded by some as a form of disguised annexation,<sup>1</sup> but that view did not prevail.<sup>2</sup> Institutions based on self-determination have also been regarded as having a relatively permanent, or 'dispositive', status; for example, the Mandate regime survived the extinction of the League of Nations in 1946,<sup>3</sup> with the result, *semble*, that United Nations membership effected a form of novation of reporting responsibilities from the League Council to the General Assembly.<sup>4</sup> The principle has also been regarded as justifying the revocation or termination of rights to administer territory conferred by international agreement in the event of fundamental violation of the humanitarian interests sought to be protected by those agreements.<sup>5</sup> Other examples might be given.<sup>6</sup>

(d) *Conclusions*. The issue then is whether there is sufficient State practice, carried out with a conviction that the activity is obligatory, to establish self-determination—at least as a principle capable of generating these types of consequences—as part of customary international law. Although this view has been denied by some writers,<sup>7</sup> it was adopted by the International Court in two recent cases. In the *Namibia* opinion a majority of the Court held that . . . the subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of

<sup>1</sup> Cf. the dispute on the point between South Africa and the Permanent Mandates Commission; noted this *Year Book*, 12 (1931), p. 151.

<sup>2</sup> Cf. Wright, *Mandates under the League*, pp. 324–7; Whiteman, *Digest*, vol. 1, pp. 635–50 and references.

<sup>3</sup> *Status of South West Africa* case, *I.C.J. Reports*, 1950, p. 128.

<sup>4</sup> *Ibid.* Judges McNair (at pp. 159–62) and Read (at pp. 166–73) dissented on this point. See further the works cited *supra*, p. 153 n. 2.

<sup>5</sup> *Namibia* opinion, *I.C.J. Reports*, 1971, p. 6; Dugard, *American Journal of International Law*, 62 (1968), pp. 78–97. It is of interest that revocation was contemplated as a legal possibility in the original proposal for a Mandate system: General Smuts, *The League of Nations—A Practical Proposal* (1919), reprinted in Hunter Miller, *The Drafting of the Covenant*, vol. 2, p. 32.

<sup>6</sup> Thus Higgins argues that the principle of domestic jurisdiction does not operate to preclude discussion of self-determination situations in United Nations' organs: *Development*, pp. 90–106; cf. Brownlie, *Principles*, p. 577, and the *Aaland Islands* case, *supra*, p. 149 n. 1. It has even been argued that self-determination has developed into a norm of *jus cogens*, having the effect, *inter alia*, of depriving administering States of their sovereignty over such territories: Bedjaoui, *I.L.C. Yearbook*, 1975–I, p. 49; Calogeropoulos-Stratis, *Le droit des peuples à disposer d'eux-mêmes* (1973), p. 113; Rigo Sureda, *The Evolution of the Right of Self-Determination*, p. 353; but cf. p. 223. It is not at all clear either that Art. 73 purports to do this, or that subsequent developments could have this effect: cf. Jennings, *The Acquisition of Territory in International Law* (1963), pp. 78–87. See also *supra*, p. 154 n. 2. Some fairly extensive conventional development has also been attempted, e.g. Revised Single Negotiating Text on the Law of the Sea, A/Conf. 62/WP. 81 Rev. 1/Part II (1976), Transitional Provision; International Convention on the Elimination of All Forms of Racial Discrimination (1966), Art. 15; *United Nations Treaty Series*, vol. 660, p. 195. For the United Kingdom's reservation concerning Art. 15 see U.N., *Multilateral Treaties for which the Secretary-General acts as Depositary*, 1975, p. 93. Cf. Nathanson and Schwelb, *The United States and the United Nations Treaty on Racial Discrimination* (Washington, 1975), pp. 13–14.

<sup>7</sup> Fitzmaurice, for example, calls it juridical nonsense: *Institut de Droit International, Livre du Centenaire* (1973), pp. 196–363 at p. 233. See also Verzijl, *International Law in Historical Perspective*, vol. 1, p. 324; Blum, *Israel Law Review*, 10 (1975), pp. 509–14; Emerson, *American Journal of International Law*, 65 (1971), pp. 459–75, and *Self-Determination Revisited in the Era of Decolonization* (1964); Devine, *Acta Juridica*, 1974, pp. 183–209; Jenks, in *Law in the World Community* (1967), pp. 134–49 at p. 141. Much of the dissent is based on the assumption that self-determination is asserted as a general right of 'peoples'.



self-determination applicable to all of them. The concept of the sacred trust was confirmed and expanded to all 'territories whose peoples have not attained a full measure of self-government' (Art. 73). Thus it clearly embraced territories under a colonial regime. Obviously the sacred trust continued to apply to League of Nations mandated territories on which an international status had been conferred earlier. A further important stage in this development was the Declaration on the Granting of Independence to Colonial Countries and Peoples . . ., which embraces all peoples and territories which 'have not yet attained independence'. Nor is it possible to leave out of account the political history of mandated territories in general. All those which did not acquire independence, excluding Namibia, were placed under trusteeship. Today, only two out of fifteen, excluding Namibia, remain under United Nations tutelage. This is but a manifestation of the general development which has led to the birth of so many new States.<sup>1</sup>

This important passage was cited with approval by the Court in the *Western Sahara* opinion, in an opinion which strongly affirmed the right of the people of the territory to determine their future political status, notwithstanding claims to revindication on the part of Morocco and Mauritania.<sup>2</sup> Self-determination was also reaffirmed as the relevant juridical principle in several of the separate opinions;<sup>3</sup> the most interesting of these, for our purposes, were those of Judges Dillard and Petré.

Judge Dillard, after referring briefly to the contrasting opinions on the point, went on

. . . to call attention to the fact that the present Opinion is forthright in proclaiming the existence of the 'right' in so far as the present proceedings are concerned. This is made explicit in paragraph 56 and is fortified by calling into play two dicta in the *Namibia* case to which are added an analysis of the numerous resolutions of the General Assembly dealing in general with its decolonization policy and in particular with those resolutions centering on the Western Sahara (Opinion, paras. 60-65). The pronouncements of the Court thus indicate, in my view, that a norm of international law has emerged applicable to the decolonization of those non-self-governing territories which are under the aegis of the United Nations. It should be added that the force of these pronouncements is in no way diminished by virtue of the theoretically non-binding character of an advisory opinion.<sup>4</sup>

Later Judge Dillard referred to

the cardinal restraint which the legal right of self-determination imposes. That restraint may be captured in a single sentence. It is for the people to determine the destiny of the territory and not the territory the destiny of the people. Viewed in this perspective it becomes almost self-evident that the existence of ancient 'legal ties' of the kind described in the Opinion, while they may influence some of the projected procedures for decolonization, can have only a tangential effect in the ultimate choices available to the people.<sup>5</sup>

<sup>1</sup> *I.C.J. Reports*, 1971, p. 6 at p. 31; cf. Judge Ammoun at pp. 73-5; Judge Padilla Nervo at p. 115.

<sup>2</sup> *I.C.J. Reports*, 1975, p. 12 at pp. 31-3; cf. *supra*, p. 154.

<sup>3</sup> *Ibid.*, pp. 99-100 (Judge Ammoun); pp. 30-1 (Judge Nagendra Singh); pp. 170-1 (Judge de Castro).

<sup>4</sup> *Ibid.*, pp. 121-2.

<sup>5</sup> *Ibid.*, p. 122.



With this forthright view may be compared the nuances of Judge Petrén's separate opinion. He pointed out that

a veritable law of decolonization is in the course of taking shape. It derives essentially from the principle of self-determination of peoples proclaimed in the Charter of the United Nations and confirmed by a large number of resolutions of the General Assembly. But, in certain specific cases, one must equally take into account the principle of the national unity and integrity of States, a principle which has also been the subject of resolutions of the General Assembly. It is thus by a combination of different elements of international law evolving under the inspiration of the United Nations that the process of decolonization is being pursued . . . [H]owever . . . the wide variety of geographical and other data which must be taken into account in questions of decolonization have not yet allowed of the establishment of a sufficiently developed body of rules and practice to cover all the situations which may give rise to problems. In other words, although its guiding principles have emerged, the law of decolonization does not yet constitute a complete body of doctrine and practice. It is thus natural that political forces should be constantly at work rendering more precise and complete the content of that law in specific cases like that of Western Sahara.<sup>1</sup>

There is here a certain studied ambiguity. The passage may simply mean that, although the guiding principles (and in particular the principle of self-determination) of the 'law of decolonization' have emerged, certain aspects of the application of those legal principles remain unclear and thus *de lege ferenda*. This is certainly the case, although the area of uncertainty can be exaggerated, and the Court did in fact, with a considerable degree of unanimity, provide an answer to a Request concerning just such an area of doubt. On the other hand, the passage might be interpreted as meaning that, since the application of the guiding principles remains in some cases unclear or uncertain, the principles themselves, and thus the whole 'law of decolonization' remain essentially *de lege ferenda*. This latter interpretation implies a somewhat cataclysmic view of the growth and creation of international law rules: until a suggested rule has become clear in principle and application, it is not a rule at all. That view would constitute a powerful solvent in many areas of customary law, but it is of doubtful validity, and it is equally doubtful that Judge Petrén in fact adopted it. 'Guiding juridical principles' can certainly co-exist with uncertainties as to their application in specific cases: so long as there exists a 'hard core' of reasonably clear cases, the status of the principle in question need not be doubted. On the other view, the emergence of a 'law of decolonization' must await the completion of the process of decolonization, since only then would no doubts or difficulties exist.

The principle of self-determination as a general principle of international law also commands substantial academic support.<sup>2</sup>

<sup>1</sup> Ibid., p. 110.

<sup>2</sup> Cf. Scelle, in *Spiropoulos Festschrift* (1957), pp. 385-92; Brownlie, *Principles*, pp. 575-8; Delupis, *International Law and the Independent State* (1974), pp. 13-18; Calogeropoulos-Stratis, *Le droit des peuples à disposer d'eux-mêmes* (1973); Rigo Sureda, *The Evolution of the Right of Self-Determination* (1973) (the best monograph); Umozurike, *Self Determination in International*

It would seem then that the following conclusions are supported by current practice.

1. International law recognizes the principle of self-determination.
2. It is, however, not a right applicable directly to any group of people desiring political independence or self-government. Like sovereignty, it is a legal principle: Fawcett calls it a 'directive principle of legislation'.<sup>1</sup> It applies as a matter of right only after the unit of self-determination has been determined by the application of appropriate rules.
3. The units to which the principle applies are in general those territories established and recognized as separate political units: in particular it applies to the following:

- (a) Trust and Mandated territories, and territories treated as Non-Self-Governing under Chapter XI of the Charter;
- (b) States, excluding for the purposes of the self-determination rule those parts of States which are themselves self-determination units as defined;
- (c) (Possibly) other territories forming distinct political-geographical areas, whose inhabitants do not share in the government either of the region or of the State to which the region belongs, with the result that the territory becomes in effect, with respect to the remainder of the State, non-self-governing;<sup>2</sup>

and

- (d) All other territories or situations to which self-determination is applied by the parties as an appropriate solution or criterion.

4. Where a self-determination unit is not already a State, it has a right of self-determination: that is, a right to choose its own political organization. Such a right, in view of its close connection with fundamental human rights, is to be exercised by the people of the relevant unit without coercion and on a basis of equality.<sup>3</sup>

*Law* (1972); Lachs, *Indian Journal of International Law*, 1 (1960-1), pp. 429-42; Higgins, *Development*, pp. 90-106; Bokor-Szegö, *New States and International Law*, pp. 82-101; Tunkin, *Theory of International Law* (1974), pp. 60-9 (and refs. to Soviet literature); Wright, *Proceedings of the American Society of International Law*, 48 (1954), pp. 23-37; Mustafa, *International Lawyer*, 5 (1971), pp. 479-87; Akehurst, *A Modern Introduction to International Law* (2nd edn., 1971), pp. 281-4; Šuković in Šahović (ed.), *Principles of International Law concerning Friendly Relations and Cooperation* (1972), pp. 323-74; Johnson, *Georgia Journal of International and Comparative Law*, 3 (1973), pp. 145-63; Kaur, *Indian Journal of International Law*, 10 (1970), pp. 479-502; Menon, *Revue de droit international, de sciences diplomatiques et politiques*, 53 (1975), pp. 183-200, 272-82; and cf. the more reserved account by Sinha, *Indian Journal of International Law*, 14 (1974), pp. 332-61.

<sup>1</sup> Fawcett, *Recueil des cours*, 132 (1971), pp. 386-91 at p. 387.

<sup>2</sup> In determining the territories in this category, G.A. Resolution 1541 (XV), Annex ('Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for in Article 73(e) of the Charter of the United Nations') will provide useful, if not authoritative, guidance.

<sup>3</sup> See Johnson, *Self-determination within the Community of Nations* (1967), and the early classic studies by Wambaugh, *A Monograph on Plebiscites* (1920); *Plebiscites since the World War* (1933).



5. Self-determination can result either in the independence of the self-determining unit as a separate State, or in its incorporation into or association with another State on a basis of political equality for the people of the unit.<sup>1</sup>

6. Matters of self-determination cannot be within the domestic jurisdiction of the metropolitan State.<sup>2</sup>

7. Where a self-determination unit is a State, the principle of self-determination is represented by the rule against intervention in the internal affairs of that State, and in particular in the choice of the form of government of the State.

(ii) *Statehood and the operation of the principle of self-determination*

The relationship between the legal principle of self-determination and statehood must now be considered. It seems that, in situations such as the Congo, the principle of self-determination will operate to reinforce the effectiveness of territorial units created with the consent of the former sovereign.<sup>3</sup> However, this only holds good where the new unit is itself created consistently with the principle of self-determination. Where, as with the *Bantustans* in South West Africa (Namibia), a local unit is created in an effort to prevent the operation of the principle to the larger unit, different considerations apply.<sup>4</sup> The same principle holds good in cases of secession. The secession of a self-determination unit, where self-determination is forcibly prevented by the metropolitan State, will be reinforced by the principle of self-determination, so that the degree of effectiveness required as a precondition to recognition may be substantially less than in the case of secession within a metropolitan unit. The contrast between the cases of Guinea-Bissau<sup>5</sup> and Biafra<sup>6</sup> is marked, and may be explicable along these lines.<sup>7</sup> As a consequence, the rules relating to intervention in the two cases are, it seems, different.<sup>8</sup>

<sup>1</sup> Cf. Principle VI of Annex to G.A. Res. 1541 (XV), cited with approval in the *Western Sahara* opinion, *I.C.J. Reports*, 1975, p. 12 at p. 32.

<sup>2</sup> Cf. *supra*, p. 157 n. 6. See also Rajan, *United Nations and Domestic Jurisdiction* (2nd edn., 1961), pp. 214–22, for an assessment of the earlier practice.

<sup>3</sup> *Supra*, pp. 116–17.

<sup>4</sup> On the 'bantustan' policy in South West Africa see Dugard, *The South West Africa/Namibia Dispute* (1973), pp. 236–8, 431–5; Umozurike, *op. cit.* (above, p. 159 n. 2), pp. 133–7; D'Amato, *Journal of Modern African Studies*, 4 (1966), pp. 177–92; cf. *Namibia* opinion, *I.C.J. Reports*, 1971, p. 6 at p. 57. For more recent developments see *Comparative and International Law Journal of Southern Africa*, 9 (1976), pp. 277–81; S.C. Res. 385 (1976), 20 August 1976.

<sup>5</sup> Guinea-Bissau was widely recognized as a State before Portuguese recognition, despite the continued presence of Portuguese troops. See especially Rousseau, *Revue générale de droit international public*, 78 (1974), pp. 1166–71; Zorgbibe, *La guerre civile* (1975), pp. 140–1. Cf. G.A. Resns. 3061 (XXVIII), 2 November 1973, para. 1 (93–7:30); 3181 (XXVIII), 17 December 1973 (108–0:9); S.C. Res. 356 (1974), 12 August 1974 (15–0:0). Portuguese recognition was only accorded on 10 September 1974: *International Legal Materials*, 13 (1974), p. 1244.

<sup>6</sup> Despite a lengthy insurgency, Biafra was only recognized by a few States, and then, it seems, on special grounds: cf. Nyerere, in Kirk-Greene, *Crisis and Conflict in Nigeria. A Documentary Source-Book 1966–1969* (1971), vol. 2, pp. 202–11, 429–39. The better view is that Biafra was never a State: Higgins, in Luard (ed.), *The International Regulation of Civil Wars* (1972), p. 175; Ijalaye, *American Journal of International Law*, 65 (1971), pp. 551–9; Elias, *Nigerian Law Journal*, 5 (1971), pp. 1–18. *Contra*, Okeke, *Controversial Subjects of Contemporary International Law* (1974), p. 165.

<sup>7</sup> Cf. Brownlie, *Principles*, pp. 82–3. Zorgbibe, *op. cit.* (above, n. 5), pp. 136–40, is critical.

<sup>8</sup> Cf. *infra*, pp. 166–72, and see Fujita, *Revue de droit international, de sciences diplomatiques*



These are, however, ancillary or rather peripheral applications of the principle. The question remains whether the principle of self-determination is capable of preventing an effective territorial unit, the creation of which was a violation of self-determination, from becoming a State. Practice in this area is not well developed, but in one case—Rhodesia—the problem has been raised squarely.

(iii) *Self-determination and effectiveness: the case of Rhodesia*

Since its unilateral declaration of independence on 11 November 1965, the minority government has exercised effective control within the territory of Southern Rhodesia, and it is the only government which has exercised such control, despite British claims to do so under the Southern Rhodesia Act 1965 and generally. There can be no doubt that, if the traditional tests for independence of a seceding colony were applied, Rhodesia would be an independent State.<sup>1</sup> However, Southern Rhodesia is not recognized by any State as independent, nor has it been regarded as a State by the United Nations.<sup>2</sup> The unilateral declaration of independence was immediately condemned by the General Assembly,<sup>3</sup> and the Security Council, which decided 'to call upon all States not to recognize this illegal racist minority regime in Southern Rhodesia and to refrain from rendering any assistance to this illegal regime'.<sup>4</sup> A further Council Resolution of 20 November 1965 stated that the declaration of independence had 'no legal validity' and referred to the Smith government as an 'illegal authority'.<sup>5</sup> Partly, at least, on this basis various types of sanction have been authorized against Southern Rhodesia. The present position is that, despite the effectiveness of the government in Southern Rhodesia, the United Kingdom is regarded as the administering authority of the territory, which is still a non-self-governing territory under Chapter XI of the Charter.

Against this background, only three positions seem possible: that Rhodesia is in fact a State, and that action against it, so far as it is based on the contrary proposition, is illegal; that recognition is constitutive, and in view of its non-recognition Rhodesia is not a State; or that the principle of self-determination in this situation prevents an otherwise effective entity from being regarded as a State. In view of the consistent practice referred to, the first position is difficult

*et politiques*, 53 (1975), pp. 81–142; Dugard, *International and Comparative Law Quarterly*, 16 (1967), pp. 157–90; Ronzitti, *Le guerre di liberazione nazionale e il diritto internazionale* (1974), for examination of the various issues.

<sup>1</sup> Fawcett, *Modern Law Review*, 34 (1971), p. 417; Coetzee, *The Sovereignty of Rhodesia and the Law of Nations* (1970).

<sup>2</sup> In 1966 the minority government forwarded communications to the Secretary-General and affirmed a right, as a 'state which is not a Member of the United Nations', to participate in proceedings under Article 32 of the Charter. The Secretary General stated that . . . 'the legal status of Southern Rhodesia is that of a Non-Self-Governing Territory under resolution 1747 . . . and Article 32 of the Charter does not apply . . .'. There was no dissent from this view, and the minority government was not invited to participate under Article 32 or otherwise: *Security Council Official Records*, 1280th mtg., 18 May 1966, p. 23. For criticism, see Stephen, *American Journal of International Law*, 67 (1973), pp. 479–90.

<sup>3</sup> G.A. Res. 2024 (XX), 11 November 1965 (107-2:1).

<sup>4</sup> S.C. Res. 216 (1965), 12 November 1965 (10-0:1), para. 2.

<sup>5</sup> S.C. Res. 217 (1965) (10-0:1), para. 3.

to accept.<sup>1</sup> Moreover, it would appear that the Southern Rhodesian Government does not itself dissent from the view that the United Kingdom retains authority with respect to its affairs, since it apparently accepts that any settlement of the situation must be approved and implemented by the United Kingdom. The question of recognition has been discussed already, and the conclusion reached that recognition is in principle declaratory.<sup>2</sup> It may therefore be the case that Southern Rhodesia is not a State because the minority government's declaration of independence was and is internationally a nullity, as a violation of the principle of self-determination. In Fawcett's words,

... to the traditional criteria for the recognition of a regime as a new State must now be added the requirement that it shall not be based upon a systematic denial in its territory of certain civil and political rights, including in particular the right of every citizen to participate in the government of his country, directly or through representatives elected by regular, equal and secret suffrage. This principle was affirmed in the case of Rhodesia by the virtually unanimous condemnation of the unilateral declaration of independence by the world community, and by the universal withholding of recognition of the new regime which was a consequence.

It would follow then that the illegality of the rebellion was not an obstacle to the establishment of Rhodesia as an independent State, but that the political basis and objectives of the regime were, and that the declaration of independence was without international effect.<sup>3</sup>

This view has been contested by Devine, who, significantly, was forced from a quasi-declaratory<sup>4</sup> to a firmly constitutive view<sup>5</sup> of recognition by his consideration of the Rhodesian affair. Devine's position is to some extent vitiated by his formulation of Fawcett's criterion as one of 'good government'.<sup>6</sup> It is quite clear that good government is not a criterion for statehood, but the contrary is not contended.<sup>7</sup> The position is a more limited one: that where a particular territory is a self-determination unit as defined, no government will be recognized which comes into existence and seeks to control the territory as

<sup>1</sup> To the same effect Brownlie, *Principles*, p. 101; Higgins, *The World Today*, 23 (1967), pp. 94-106 at p. 98; it is also the view of Harold Wilson, *The Labour Government 1964-1970* (1971), p. 966. *Contra* Marston, *International and Comparative Law Quarterly*, 18 (1969), p. 1 at p. 33; Verhoeven, *Reconnaissance*, p. 548.

<sup>2</sup> *Supra*, pp. 99-107.

<sup>3</sup> This *Year Book*, 41 (1965-6), p. 103 at pp. 112-13, citing the Universal Declaration, the Colonial Declaration and G.A. Res. 648 (VI). Brownlie regards the status of Rhodesia as flowing from 'particular matters of fact and law' without further elaboration: *Principles*, p. 101. Marshall argues that, because Rhodesia remained a monarchy but the Queen refused to act, there was 'no legal entity which can be recognized': *International and Comparative Law Quarterly*, 17 (1968), pp. 1022-34 at p. 1033. But the proclamation of a Republic in 1970 has not been regarded as altering Rhodesia's international status—and certainly has not increased that status. Okeke, *Controversial Subjects of Contemporary International Law* (1974), p. 88 refers to Fawcett's position with apparent approval, but none the less concludes that 'Rhodesia ranks among the entities which are endowed with statehood under international law' (at pp. 104-5).

<sup>4</sup> *Acta Juridica*, 1967, pp. 39-47.

<sup>5</sup> *Acta Juridica*, 1973, pp. 1-171, at pp. 142-5; also McDougal and Reisman, *American Journal of International Law*, 62 (1968), pp. 1-19, at p. 17. Cf. Devine, *Comparative and International Law Journal of Southern Africa*, 2 (1969), pp. 454-66.

<sup>6</sup> *Modern Law Review*, 34 (1971), p. 140; *Acta Juridica*, 1973, pp. 83-6.

<sup>7</sup> Cf. Fawcett's reply, *Modern Law Review*, 34 (1971), p. 417.



a State in violation of self-determination.<sup>1</sup> This principle does not—at this stage of the development of international law and relations—constitute a principle of law with respect to existing States.<sup>2</sup> But the evidence in favour of this principle as it applies to self-determination units, and in particular to non-self-governing territories, though it may be restricted to the one case of Rhodesia,<sup>3</sup> is consistent and uniform. It appears then that a new rule has come into existence, prohibiting entities from claiming statehood if their creation is in violation of an applicable right to self-determination.<sup>4</sup> That this principle is capable of having very substantial effects if generally applied may be conceded. However, the relatively limited extent of the right of self-determination has been noted. Moreover it can hardly be regretted that a rule which merely ratifies the international position of effective but unrepresentative regimes is open to change.

### 3. ENTITIES CREATED BY THE ILLEGAL USE OF FORCE<sup>5</sup>

Article 2 paragraph 4 of the Charter prohibits the threat or use of force against the territorial integrity or political independence of any State or in any other manner inconsistent with the purposes of the United Nations. This prohibition does not affect the right to self defence against armed attack under Article 51.<sup>6</sup> These rules concerning illegal use of force are the clearest case of *jus cogens* norms, although separate provision was made for them in the Vienna Convention.<sup>7</sup> Moreover the principle that territory may not be validly acquired by the illegal use of force is well established.<sup>8</sup> The principles of State succession

<sup>1</sup> Devine accepts the proposition that the Smith government came into existence in violation of self-determination in a political sense: *Acta Juridica*, 1973, p. 67. But he regards self-determination as 'too controversial, unaccepted and vague to be used by the Rhodesians as a shield or by anyone else as a sword against them': *ibid.*, p. 77; and cf. *Acta Juridica*, 1974, pp. 182–209.

<sup>2</sup> That is to say, it does not invalidate the position of unrepresentative governments in existing States. The analogue of self-determination in the case of existing States is the duty of non-intervention in internal affairs. The incidents of that duty are somewhat controversial: they are in any event essentially negative. But for the Transkei see *post*, pp. 176–80.

<sup>3</sup> Cf. Devine, *Modern Law Review*, 34 (1971), p. 415, and Fawcett's reply, *ibid.*, p. 417. Rhodesia is undoubtedly the plainest instance, but the situation has analogues: e.g. Katanga and the Bantustans. The situation in Guinea-Bissau was an instance of the operation of the rule in the reverse situation: *supra*, p. 161 n. 5. Moreover it is quite possible for a rule to consolidate by virtue of consistent practice in one central, even if isolated, case: e.g. the development of neutrality in the American Civil War.

<sup>4</sup> The Privy Council in *Madzimbamuto v. Lardner-Burke*, [1968] 3 W.L.R. 1229, at p. 1250 did not consider this position, arguing instead that Southern Rhodesia was not a State because the legitimate government was still trying to reassert itself. Cf. *In re James*, [1977] 2 W.L.R. 1 (C.A.).

<sup>5</sup> The literature on statehood and the use of force is, to say the least, sparse. Hunnings, *Yearbook of the Association of Attenders and Alumni*, 32 (1962–3), pp. 58–65, does not consider the problem. There is a useful and characteristic contribution by Baty, *Yale Law Journal*, 36 (1926–7), pp. 966–84 (based of course on the old regime of rules relating to the use of force). The relationship between State extinction and the use of force has of course been considered extensively: *post*, 173–6.

<sup>6</sup> See generally Brownlie, *International Law and the Use of Force by States* (1963); Higgins, *Development*, Pt. IV; Bowett, *Self-Defence in International Law* (1958).

<sup>7</sup> Vienna Convention on the Law of Treaties, Arts. 52, 53. Art. 52 was reaffirmed in the *Fisheries Jurisdiction* case (*First Phase*), *I.C.J. Reports*, 1973, p. 3 at p. 19.

<sup>8</sup> Whiteman, *Digest*, vol. 5, pp. 874–965, and authorities there cited.



do not, it seems, apply to cases involving the violation of the Charter, and in particular of Article 2 paragraph 4.<sup>1</sup> The protection accorded States by Article 2 paragraph 4 extends to continuity of legal personality in the face of illegal invasion and annexation: there is a substantial body of practice protecting the legal personality of the State against extinction, despite prolonged lack of effectiveness.<sup>2</sup> In summary, the prohibition of the threat or use of force in international relations is one of the most fundamental of international law rules: the international community has with considerable consistency refused to accept the legal validity of acts done or situations achieved by the illegal use of force. If ever effective territorial entities, not recognized as States, were to have their status regulated by international law, it would, one would think, be so regulated by the rules relating to the use of force.

Of course, quite apart from Article 2 paragraph 4, there is a presumption against the independence of entities created by the use of force or during a period of belligerent occupation.<sup>3</sup> The question is whether modern law regulates the creation of States to any greater degree than this, in a situation involving illegal use of force. The difficulty of the problem is increased because, in most of the relatively few cases in which it has arisen, other factors have been determinative.

For example, in the Manchurian crisis the question whether Manchukuo could have become an independent State notwithstanding the illegal Japanese intervention was never really in issue, since the puppet nature of the Manchukuo regime was and remained evident. It is true that the League of Nations resolutions which proclaimed the duty of non-recognition referred not to lack of independence but to violation of the Covenant and the Pact of Paris.<sup>4</sup> Recognition was stated to be 'incompatible with the fundamental principles of existing international obligations'.<sup>5</sup> Despite these fairly categorical statements, League action was predicated on the Lytton Commission's finding that Manchukuo was not 'a genuine and spontaneous independence movement'. Given its total lack of independence the question whether, had it been effectively independent, it would have been deprived of statehood because of Japanese violations of the Covenant and the Pact of Paris did not really arise. The various entities created during the war by illegal use of force were also regarded as

<sup>1</sup> I.L.C., *Draft Articles on State Succession in respect of Treaties*, A/8710/Rev. 1, Art. 6. Cf. *I.L.C. Yearbook*, 1972-II, p. 60.

<sup>2</sup> *Post*, pp. 173-6.

<sup>3</sup> *Supra*, p. 129.

<sup>4</sup> Assembly Resolution, 11 March 1932: *League of Nations Official Journal*, Special Supplement No. 101/I, p. 87.

<sup>5</sup> Assembly Resolution, 24 February 1933: *ibid.*, Special Supplement No. 112/II, p. 14. The language of the resolution is taken directly from the Lytton Commission's Report: C.663.M.320. 1932 [VII], p. 128. The Chinese position was that 'in pursuance of the obligations created by the Covenant . . . it is incumbent upon the League to use, to the fullest extent necessary, its authority to prevent such a changed political situation from being created, or, if created *de facto*, from being recognized by the League or by its members as of a *de jure* character. Indeed, if brought into a *de facto* existence, in violation of the Covenant . . . it is the contention of the Chinese Government that the League should use its authority to break down that *de facto* situation in order that the political order existing prior to September . . . may be re-established' (League of Nations Doc., A. (Extr.) 105.1932 [VII] (23 April 1932), p. 8).

puppets and thus not independent.<sup>1</sup> And the status of Taiwan has been determined, not by any illegality by which it has been enabled to survive as a separate entity, but by the insistence of both governments involved that Taiwan remains part of China—a view acquiesced in by all other States.<sup>2</sup>

The puppet-State situation illustrates the difficulty, almost the dilemma, involved in any consideration of the relationship between statehood and the illegal use of force. Either the entity owes its existence directly and substantially to the illegal intervention—in which case it is unlikely to be, and will be presumed not to be, independent—or it does not, in which case the normal criteria for statehood would presumably apply. This is not a true dilemma however, since it is conceivable that an entity created by external illegal force could be genuinely independent in fact. The situation most clearly relevant is that of Bangladesh. However, that case involved also a problem of self-determination, so that we must first consider the relationship between self-determination and the rules relating to the use of force.

(i) *The relationship between self-determination and the rules relating to the use of force*

The question of the relationship between self-determination and the rules relating to the use of force has been neglected:<sup>3</sup> this discussion is therefore a tentative one. That there is, in all probability, a significant connection between the two legal principles is apparent from the Charter itself. Article 2 paragraph 4 includes an undertaking not to use force 'in any other manner inconsistent with the Purposes of the United Nations', and the development of relations 'based on respect for the principle of equal rights and self-determination of peoples' is one of those purposes. It might, however, be argued that the use of force contrary to the Purposes of the United Nations is only a subordinate aim of Article 2 paragraph 4 (cf. the word 'other'); that is, that the prevention of the use of force against the territorial integrity or political independence of States is the primary aim of the paragraph, and that the protection or advancement of the other purposes is legal only where it does not involve the use or threat of force against the territorial integrity or political independence of any State. To put it at its lowest, this is a plausible interpretation of Article 2 paragraph 4: moreover the development of Article 2 paragraph 4 in practice has tended to emphasize the prevention of overt aggression rather than, for example, the use of force by an incumbent against insurgents claiming for a territory a right of self-determination.<sup>4</sup> In view of these uncertainties, the problem of the

<sup>1</sup> *Supra*, pp. 130–3. Another interesting example, which bears close comparison with Manchuria, was the Azerbaijan independence movement in 1945–6 in northern Iran under Soviet occupation: cf. *Foreign Relations of the United States*, 1945–VIII, p. 512.

<sup>2</sup> *Supra*, p. 93 n. 9.  
<sup>3</sup> See, however, Rigo Sureda, *op. cit.* (above, p. 159 n. 2), pp. 346–51; Žourek, *L'interdiction de l'emploi de la force en droit international* (1974), pp. 108–11; Bennouna, *Le consentement à l'ingérence militaire dans les conflits internes* (1974), pp. 159–70; Dugard, *International and Comparative Law Quarterly*, 16 (1967), pp. 157–90; Šuković, *loc. cit.* (above, p. 159 n. 2), pp. 363–8.

<sup>4</sup> In the *Corfu Channel* case, *I.C.J. Reports*, 1949, p. 4, the International Court condemned the threat of force in a self-help operation where the other party's behaviour was hardly consistent with Article 1 of the Charter.



relationship between self-determination and the use of force must be considered not under some general rubric but in relation to the various types of situation that may arise. In some areas practice is reasonably well developed; in others we are reduced to speculation on the basis of general principles.

The following situations may be envisaged:

1. A self-determination unit (other than a State) is prevented from exercising its right to self-determination by the use of force.
2. A self-determination unit is invaded and annexed by force without being allowed to opt for annexation or any alternative status.
3. An effective self-governing entity is created in violation of an applicable right of self-determination by external illegal force.
4. An effective self-governing entity is created in accordance with an applicable right of self-determination by external illegal force.

It should be noted that the much debated problem of the legitimacy of rebellion, or of a local insurgent's 'right to self-defence against colonial domination' is not really in point here. Debate on the lawfulness or otherwise of the use of force by a non-State entity presupposes at least some degree of legal personality of that entity. Assuming that the legal personality derives from the legal right of the entity in question to self-determination, it seems most unlikely that the use of force to assert that right should be illegal. On that view, the existence of a right would be precisely what made its exercise illegal.<sup>1</sup> It is probably the case that the use of force by a non-State entity in exercise of a right of self-determination is legally neutral, that is, not regulated by law at all.<sup>2</sup> *A fortiori*, the question of a legal right to self-defence is not in point either. What is relevant is the legality or otherwise of action by other States in assisting or opposing the self-determination unit.

Before discussing the particular situations enumerated above, it is necessary to refer to the most important statement of principles in this area, the Declaration on Principles of International Law approved by Resolution 2625 (XXV). In its elaboration of Article 2 paragraph 4, the Declaration states that

Every State has the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of their right to self-determination and freedom and independence.

The elaboration of the principle of equal rights and self-determination repeats this formulation, and goes on to state that

In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and receive support in accordance with the purposes and principles of the Charter.<sup>3</sup>

<sup>1</sup> Cf. Devine, *Acta Juridica*, 1973, pp. 72-8; Okeke, *Controversial Subjects of Contemporary International Law* (1974), p. 86.

<sup>2</sup> On the applicability of the laws of war to self-determination conflicts see Graham, *Washington and Lee Law Review*, 32 (1975), pp. 25-63; Forsythe, *American Journal of International Law*, 69 (1975), pp. 77-91.

<sup>3</sup> Cf. Art. 7 of the Definition of Aggression, adopted without vote by G.A. Res. 3314 (XXIX), 14 December 1974; G.A. Res. 3103 (XXXIII), 12 December 1973 (83-13:19).



Taken literally, these propositions establish a close relationship between the two relevant principles, with the principle of self-determination taking priority over the prohibition of the use of force against the territorial integrity of a State. That primacy can perhaps best be expressed in the proposition that the phrase 'territorial integrity of any State' in Article 2 paragraph 4 excludes, so far as action in furtherance of self-determination is concerned, the territory of any self-determination unit as defined. The question is whether this, rather formidable, proposition, which has a certain amount of doctrinal support,<sup>1</sup> is also supported by relevant State practice.

Perhaps the most straightforward situation to be looked at is that where a self-determination unit (other than a State) is prevented from exercising its right to self-determination by the use of force. Examples of such a situation were the Portuguese African colonies prior to 1974. Military action taken by an administering power to suppress widespread popular insurrection in a self-determination unit is quite clearly capable of being a denial of self-determination and is therefore illegal on that ground. Both the General Assembly and the Security Council<sup>2</sup> have repeatedly condemned what they have described as 'colonial wars' and 'acts of repression' in the Portuguese territories, but they have refrained from characterizing the situations as aggressive war for the purposes of Article 2 paragraph 4. The contrast is demonstrated, more or less conclusively, by General Assembly Resolution 3061 (XXVIII) which, pursuant to the thesis of the independence of Guinea-Bissau,<sup>3</sup> condemned Portugal for 'illegal occupation . . . of certain sectors of the Republic . . . and acts of aggression committed against the people of the Republic'.<sup>4</sup> The difference between this language and that used in the case of Angola and Mozambique is significant. It is also consistent with the primary emphasis in Article 2 paragraph 4 on prevention of overt use of military force against the territory of another State. It is—to say the least—unlikely that the principle of self-determination deprives an administering State of its sovereignty with respect to a self-determination territory.<sup>5</sup> The use of force by a metropolitan power against a self-determination unit is not a use of force against the territorial integrity and political independence of a State, though it will of course be in another manner inconsistent with the purposes of the United Nations.

The second situation—that is, invasion and annexation of a self-determination unit by external force without according the people of the invaded territory any right to choose their future status—is also relatively straightforward. Invasion and annexation of territory is quite generally illegal, and the separate status of a territory for the purposes of the self-determination rule would, if anything,

<sup>1</sup> *Supra*, p. 166 n. 3; Bedjaoui, *I.L.C. Yearbook*, 1975-I, pp. 48-9. But neither Umozurike nor Calogeropoulos-Stratis refers to the problem at all.

<sup>2</sup> e.g., S.C. Res. 322 (1972); Anderson, *Denver Journal of International Law and Politics*, 4 (1974), pp. 133-51.

<sup>3</sup> Cf. *supra*, p. 161 n. 5.

<sup>4</sup> G.A. Res. 3061 (XXVIII), 2 November 1973 (97-7:30).

<sup>5</sup> In the *Western Sahara* opinion, the court held that the request, relating to the future status of a non-self-governing territory, did not relate to 'existing territorial rights or sovereignty over territory': *I.C.J. Reports*, 1975, p. 12 at p. 28. Cf. *supra*, p. 157 n. 6.

reinforce the illegality. The only difficulty that might arise is in the case of annexation of a territory which is not, in the full sense, a self-determination unit but rather a 'colonial enclave'. The distinction between those two types of territory is a troublesome aspect of United Nations practice.<sup>1</sup> But even if one were to accept its validity, it is none the less the case that forcible annexation by the surrounding ('enclaving') State is probably illegal, for the reasons stated above. When India invaded and annexed Goa in January 1961, a majority of the Security Council took the view—it is submitted correctly—that the Indian action was illegal.<sup>2</sup> India claimed that Goa was historically and legally Indian territory and that Article 2 paragraph 4 did not, therefore, apply.<sup>3</sup> However, India had on several occasions expressly recognized Portuguese sovereignty over its Indian territories, whilst claiming their restitution. Bearing in mind the predominant Charter emphasis on peaceful change, the better opinion would appear to be that Article 2 paragraph 4 applies to any established *de facto* political boundary, and that the international interest in peaceful settlement of disputes takes priority over specific territorial claims of third States.<sup>4</sup> The significance of self-determination in this context may be not so much that it cures illegality as that it may allow illegality to be more readily accommodated through the processes of recognition and prescription, whereas in other circumstances aggression partakes of the nature of a breach of *jus cogens* and is not, or not readily, curable by prescription, lapse of time or acquiescence.

The third and fourth situations (see p. 167 above) are considerably more difficult. The fourth situation is that in which an effective self-governing entity is created in pursuit of an applicable right of self-determination by external force which would, apart from any considerations arising from the principle of self-determination, be illegal under Article 2 paragraph 4. This type of case in practice involves two distinct problems: external aid to insurgents in a self-determination situation; and the large-scale use of force by another State aimed directly at 'liberating' a self-determination territory.

## (ii) *Assistance to established local insurgents*

On numerous occasions General Assembly resolutions have encouraged or enjoined assistance, civil or military, to local insurgents either in general terms or in relation to specific territories. For example, Resolution 2795 (XXVI) ('Question of Territories under Portuguese Administration'), by clause 13,

*Request[ed] all States . . . in consultation with the Organization of African Unity, to render to the peoples of the Territories under Portuguese domination, in particular*

<sup>1</sup> See esp. Rigo Sureda, *op. cit.* (above, p. 159 n. 2), pp. 214–19; Franck and Hoffman, *New York University Journal of International Law and Politics*, 8 (1976), pp. 331–86, for discussion of the practice.

<sup>2</sup> S/5033; *Security Council Official Records*, 988th mtg., 18 December 1961, pp. 26–7 (7–4:0).

<sup>3</sup> *Ibid.*, 987th mtg., 18 December 1961, p. 89; 988th mtg., 18 December 1961, pp. 14–19.

<sup>4</sup> On Goa see Brownlie, *International Law and the Use of Force by States*, pp. 349, 379–83; Higgins, *Development*, pp. 187–8; Wright, *American Journal of International Law*, 56 (1962), pp. 617–32. By a treaty of 31 December 1974, Portugal recognized Indian sovereignty over the former Portuguese territories in India: *Keesing's Contemporary Archives*, 1975, p. 26922B.



the population in the liberated areas of those Territories, all the moral and material assistance necessary to continue their struggle for the restoration of their inalienable right to self-determination and independence.<sup>1</sup>

Resolutions in this form request what would seem to be illegal intervention against the established government in civil wars. Does the traditional rule of neutrality in civil wars apply in the case of colonial wars? Certainly that has been the contention of many of the newer States in the Assembly. For present purposes, however, the question of the legality of aid to insurgents in non-self-governing or other self-determination territories is of peripheral importance. What is quite clear is that the receipt of such aid is not regarded as relevant where the local unit achieves effective self-government, whether by military or other means. For example, the fact that large amounts of aid were given to the P.A.I.G.C. in Guinea-Bissau did not prevent general recognition of Guinea-Bissau as a State prior to Portuguese recognition.<sup>2</sup>

### (iii) *Military intervention in aid of self-determination*

Where, on the other hand, the emergence of local self-government in a self-determination unit is the result not of insurgency but of external military intervention, the situation would appear to be quite different. With this situation must be considered the third case enumerated above; that is, the emergence of an effective self-governing entity as a result of military intervention in violation of self-determination. The two cases most closely relevant are Manchukuo and Bangladesh. Three possibilities exist. It may be that the effectiveness of the emergent entity is in all situations to be regarded as paramount, so that its illegality of origin—however serious—will not impede recognition as a State. It may be that, in both cases, the illegality of origin should be regarded as paramount in accordance with the maxim *ex injuria non oritur jus*. Or, thirdly, it may be that, in the self-determination situation, the status of the local entity and the legality of the use of force ought to be regarded as separate issues so that the illegality of the intervention should not prejudice the pre-existing right of the local unit to self-determination.

Any discussion of this problem will be of necessity tentative. Practice is undeveloped,<sup>3</sup> and the conflicts of political interest in situations of this type threaten to overwhelm considerations of principle. On the other hand, very many areas of State practice which are in principle regulated by international law are also highly politicized. Moreover there do exist accepted principles of legality which regulate the legal effects of State conduct in areas closely related to the situation under discussion. For example, if State personality is preserved despite effective but illegal annexation by force,<sup>4</sup> it is not *a priori* impossible that statehood should be denied an entity *created* by external illegal force. If the

<sup>1</sup> G.A. Res. 2795 (XXVI), 10 December 1971 (105-8:5).

<sup>2</sup> *Supra*, p. 161 n. 5.

<sup>3</sup> Manchukuo apart, there is no case where an effective entity illegally created by the use of external force has claimed statehood—that is, there is no analogue to the Rhodesian situation. But for Bangladesh see *infra*, pp. 171-2.

<sup>4</sup> *Post*, pp. 173-6.



rule regulating the use of force in international relations is sufficiently important to outweigh the principle of effectiveness in the one situation, there seems to be no reason why it should not have a similar effect in the other situation. Equally, if a State cannot acquire territory by the use of force, it should not be able to achieve the same result in practice by fomenting, and then supporting, insurrection.<sup>1</sup> This latter consideration was an important one in the Manchurian crisis, although, as we have seen, the lack of independence of 'Manchukuo' enabled the situation to be dealt with, at least in form, within the structure of the legal rules deriving from the principles of effectiveness and *de facto* independence.

An analysis of this problem must then centre on an assessment of the Bangladesh case.<sup>2</sup> It is clear that Indian intervention was decisive, in the events which occurred, in effecting the emergence of Bangladesh. There was substantial local support for autonomy, or, if that could not be obtained, for independence; there was also a reasonably substantial local insurgency. But there can be no doubt that Indian intervention was the dominant factor in the success of the independence movement. Yet Bangladesh, despite the Indian intervention, was rapidly and widely recognized as a State.<sup>3</sup> Indian intervention was criticized by many governments as a violation of the Charter,<sup>4</sup> but that illegality was not regarded as derogating from the status of East Bengal, or as affecting the propriety of recognition. Indeed, not even the fact that Indian troops remained in Bangladesh was regarded as detracting from independence, despite the presumption against independence in such circumstances, which has been consistently applied elsewhere.<sup>5</sup>

The question whether East Bengal was, in 1971, a self-determination unit thus becomes important since, if it were not, or if recognition was given simply on the basis of effectiveness without regard to the legality of Indian intervention or to any denial of right to the people of East Bengal, then there would appear to be no criterion of legality regulating the creation of States by the use of external illegal force.

East Pakistan was not at any time after 1947 formally a non-self-governing territory. It would have been classified as 'metropolitan' and so outside the ambit of Chapter XI of the Charter and thus (apart perhaps from exceptional circumstances) of the customary right of self-determination. However, its status, at least as at 1971, was not quite so clear, for several reasons. In the first place,

<sup>1</sup> Baty, *Yale Law Journal*, 36 (1926-7), p. 966, at pp. 979-82; Hsu, *I.L.C. Yearbook*, 1949, pp. 112-13.

<sup>2</sup> There is a useful, though hardly impartial, study by Chowdhury, *The Genesis of Bangladesh* (1972). The factual material presented by Chowdhury is corroborated, in large part, in the *I.C.J. Review*, No. 8 (June 1972), pp. 23-62. The best analysis is that by Salmon, in *Multitudo legum, ius unum. Mélanges en honneur de Wilhelm Wengler* (1973), vol. 1, pp. 467-90. See also Franck and Rodley, *Israel Yearbook of Human Rights*, 2 (1972), pp. 142-75; Salzberg, *International Organization*, 27 (1973), pp. 115-28.

<sup>3</sup> Salmon, loc. cit. (previous note), pp. 478-9; *Revue générale de droit international public*, 78 (1974), pp. 1172-4.

<sup>4</sup> Okeke, *Controversial Subjects of Contemporary International Law* (1974), pp. 142-57.

<sup>5</sup> *Supra*, p. 129. Cf. *Revue belge de droit international*, 1974, pp. 348-50.

East Bengal probably qualified as a Chapter XI territory in 1971, if one applies the principles accepted by the General Assembly in 1960 as relevant in determining the matter.<sup>1</sup> According to Principle IV of Resolution 1541 (XV), a territory is *prima facie* non-self-governing if it is both geographically separate and ethnically distinct from the 'country administering it'. East Pakistan was both geographically separate and ethnically distinct from West Pakistan; moreover the relationship between West and East Pakistan, both economically and administratively, could be described as one which 'arbitrarily place[d] the latter in a position or status of subordination'.<sup>2</sup> It is scarcely surprising then that the Indian representative described East Bengal as, in reality, a non-self-governing territory.<sup>3</sup> In any case, in view of the denial of fundamental rights to the people of East Bengal together with its territorial and political coherence, East Bengal may have qualified in 1971 as a self-determination unit within the third, exceptional, category referred to above,<sup>4</sup> even if it was not, strictly speaking, a non-self-governing territory. The view that East Bengal had, in March 1971, a right to self-determination has received some juristic support.<sup>5</sup> In any event the particular, indeed the extraordinary, circumstances of East Bengal in 1971-2 were undoubtedly important factors in the decisions of other governments to recognize, rather than oppose, the secession. The comparison with international opposition to secession in other cases is marked.<sup>6</sup>

Thus, Salmon, after a cautious and reasoned assessment, concludes:

La même idée que si l'acte de force créant le Bangla-Desh fut illicite, le résultat ne l'est pas—car il fait suite à une autre violence qui empêchait ce peuple à disposer de lui-même—explique que n'ont point joué ici les règles qui interdisent de reconnaître une situation lorsque la reconnaissance constitue une intervention dans les affaires intérieures des autres Etats ou lorsqu'il s'agit d'une acquisition territoriale obtenue par la menace ou l'emploi de la force.<sup>7</sup>

#### (iv) *Conclusions*

The position which would appear to be most consistent with general principle, as well as supported by such practice as there has been, seems then to be as follows.

1. The use of force against a self-determination unit by a metropolitan State is a use of force against one of the Purposes of the United Nations, and a violation of Article 2 paragraph 4 of the Charter. Such a violation cannot of course effect the extinction of the right.

2. The annexation of a self-determination unit by external force in violation

<sup>1</sup> G.A. Res. 1541 (XV), 15 December 1960 (89-2:21). India and Pakistan both voted in favour.

<sup>2</sup> Res. 1541 (XV), Annex, Principle V.

<sup>3</sup> *Security Council Official Records*, 1606th mtg., 4 December 1971, para. 185.

<sup>4</sup> *Supra*, p. 160.

<sup>5</sup> Chowdhury, *op. cit.* (above, p. 171 n. 2), pp. 188 sqq.; Okeke, *op. cit.* (above, p. 163 n. 3), pp. 131-41; Mani, *Indian Journal of International Law*, 12 (1972), pp. 83-99; Nawaz, *ibid.*, 11 (1971), pp. 251-66; Nanda, *American Journal of International Law*, 66 (1972), pp. 321-36, cf. *Denver Law Journal*, 49 (1972), pp. 53-67. *Contra*, *I.C.J. Review*, No. 8 (1972), at pp. 51-2.

<sup>6</sup> This is not to say that Indian intervention was necessarily legal: cf. Franck and Rodley, *American Journal of International Law*, 67 (1973), pp. 275-305.

<sup>7</sup> Salmon, *loc. cit.* (above, p. 171 n. 2), at p. 490.

of self-determination will also not extinguish the right, except, possibly, in the controversial case of the 'colonial enclave', where the annexing State is the enclaving State and (probably) where the local population acquiesces in the annexation.

3. Assistance by States to local insurgents in a self-determination unit may, possibly and exceptionally, be permissible. In any event, local independence will not, as a matter of law, be impaired by the receipt of such external assistance.

4. Any entity claiming statehood but created during a period of foreign military occupation will be presumed not to be independent. The presumption, where the military occupation is the result of illegal invasion, is particularly rigorous (but see paragraph 6, below).

5. However, where the local unit is a self-determination unit, the presumption against independence in the case of foreign military intervention may well be dispelled. There is no prohibition against recognition of a new State which has emerged in such a situation. The normal criteria for statehood—predicated on a qualified effectiveness—apply.

6. Illegality of intervention in aid of independence of a self-determination unit does not then, as a matter of law, impair the status of the local unit. On the other hand, *semble*, where a State illegally intervenes in and foments the secession of part of a metropolitan State, other States are under the same duty of non-recognition as in the case of illegal annexation of territory.<sup>1</sup> An entity created in violation of the rules relating to the use of force in such circumstances will not be regarded as a State. To this extent it is suggested that the presumption referred to in paragraph 4 above has become an (irrebuttable) rule of law.

7. Finally, these conclusions are to some extent *de lege ferenda*. In particular situations, and especially those in which the application of self-determination to non-colonial territories is in issue, questions of acquiescence, consent and recognition remain important.

#### 4. ILLEGALITY AND EXTINCTION OF STATEHOOD

The practice under this rubric since 1945 has, fortunately, not been extensive. But the various States (Ethiopia,<sup>2</sup> Austria,<sup>3</sup> Czechoslovakia,<sup>4</sup> Poland,<sup>5</sup> and

<sup>1</sup> The situation in Cyprus after the Turkish intervention in 1974 is illustrative. It is not thought that a 'Turkish State' on Cyprus created as a result of the intervention would have been recognized or accepted: indeed, despite their support of partition, the Turkish government appears to have accepted in practice the formal requirement of a unified Cypriot State. Cf. A. V. W. and A. J. Thomas, *Southwestern Law Journal*, 29 (1975), pp. 513-46, at pp. 526-7, 543-5; *Revue générale de droit international public*, 80 (1976), pp. 1109-11; Evriviades, *Texas International Law Journal*, 10 (1975), pp. 227-64.

<sup>2</sup> Marek, *Identity and Continuity*, pp. 263-82; Langer, *Seizure of Territory*, pp. 132-54; Bentwich, this *Year Book*, 22 (1945), pp. 275-8.

<sup>3</sup> Whiteman, *Digest*, vol. 3, pp. 425-77; Clute, *The International Legal Status of Austria 1938-1955* (1962); Lemkin, *Axis Rule in Occupied Europe* (1944), pp. 108-16; Langer, *op. cit.* (previous note), pp. 155-206; Marek, *op. cit.* (previous note), pp. 338-68; H. Wright, *American Journal of International Law*, 38 (1944), pp. 621-37; Brandweiner, in Lipsky (ed.), *Law and Politics in the World Community* (1953), pp. 221-42.

<sup>4</sup> Marek, *op. cit.* (above, n. 2), pp. 283-330; Langer, *op. cit.* (above, n. 2), pp. 207-44; *Valk v. Kokes*, I.L.R., 17 (1950), No. 114.

<sup>5</sup> *Supra*, p. 102 n. 2.



Albania<sup>1</sup>) effectively submerged by external illegal force in the period 1935-40 were reconstituted by the Allies during, or at the termination of, hostilities. Despite a considerable degree of at least *de facto*, and in some cases *de jure*, recognition of annexation, the view was on the whole taken that the legal existence of these States was preserved from extinction: the maxim *ex injuria jus non oritur* was regarded, at least retrospectively, as more cogent than the competitive maxim *ex factis jus oritur*; and this despite the inconsistency of non-recognition practice in this period.<sup>2</sup> Indeed, the illegality of the extinction seems to have been regarded as constituting grounds for withdrawal of recognition (as with Austria in 1943). It is necessary however to distinguish between the States effectively submerged prior to the outbreak of the Second World War (Ethiopia, Austria, Czechoslovakia and Albania), and those occupied and annexed during the war (in particular Poland).<sup>3</sup> In the latter case, even the traditional law, based as it was more or less exclusively on the notion of effectiveness,<sup>4</sup> allowed belligerency on behalf of a subjugated State by an ally to prevent the extinction of the former.<sup>5</sup> On the other hand, *debellatio*, on the traditional view, occurred when all effective organized resistance to the invader had ceased. State practice in the cases of Ethiopia, Austria, Czechoslovakia and Albania was on the whole inconsistent with that view;<sup>6</sup> the legal personality of the State was subsequently regarded as having been preserved, so as to form the basis for the reconstruction of the State, which was not required to await a peace treaty with the defeated belligerent.

Perhaps the most interesting such case was that of Austria. The annexation of Austria by Germany in 1938 was a clear violation of Article 80 of the Treaty of Versailles;<sup>7</sup> none the less, at least *de facto* recognition of the *Anschluss* was quite general.<sup>8</sup> This general recognition notwithstanding, the Moscow Declaration of 1 December 1943 affirmed that the *Anschluss* was 'null and void', and declared a joint 'desire to see re-established a free and independent Austria'.<sup>9</sup> Austria in the period 1938-45 thus appears to have been regarded as in the same legal position as Ethiopia and Albania; its 'sovereignty . . . not . . . destroyed but only suspended'.<sup>10</sup> In the absence of any claimant Austrian government or government-in-exile, the collapse of the German government in

<sup>1</sup> Lemkin, *op. cit.* (above, p. 173 n. 3), pp. 99-107; Langer, *op. cit.* (above, p. 173 n. 2), pp. 245-53; Marek, *op. cit.* (above, p. 173 n. 2), pp. 331-7.

<sup>2</sup> Cf. Green, in Schwarzenberger (ed.), *Law, Justice and Equity* (1967), pp. 152-67 at pp. 153-8.

<sup>3</sup> *Quaere* as to the present legal status of the Free City of Danzig. Turack, this *Year Book*, 43 (1968-9), pp. 209-16, at p. 212 states, without argument, that the 'City State still exists in law'. But Skubiszewski (*loc. cit.* (above, p. 139 n. 1), at pp. 480-5) argues convincingly for Polish title over Gdansk by consolidation.

<sup>4</sup> Cf. de Visscher, *Théories et réalités en droit international public* (4th rev. edn., 1970), pp. 188-91.

<sup>5</sup> Cf. Vattel, *Le droit des gens*, Ch. xiv, especially §§ 212-13.

<sup>6</sup> Cf., however, Lauterpacht, *Recognition*, p. 356.

<sup>7</sup> *British and Foreign State Papers*, vol. 112, p. 1; and see the works cited *supra*, p. 173 n. 3.

<sup>8</sup> Marek, *op. cit.* (above, p. 173 n. 2), pp. 343-6; Clute, *op. cit.* (above, p. 173 n. 3), pp. 8-12.

<sup>9</sup> *American Journal of International Law*, 38 (1944), *Supplement*, p. 7.

<sup>10</sup> Lemkin, *op. cit.* (above, p. 173 n. 3), p. 115.

June 1945 necessitated the assumption by the Allies of governmental authority in Austria,<sup>1</sup> leading eventually to the Austrian State Treaty of 1955, terminating control machinery in Austria, and recognizing 'that Austria is re-established as a sovereign, peaceful, independent and democratic State'.<sup>2</sup> Austria was not regarded as a Second World War belligerent,<sup>3</sup> and Article 21 provided that reparations would 'not be exacted from Austria arising out of the existence of a state of war after 1st September 1939'.<sup>4</sup>

On the view taken by the Allies after 1943, it seems then that Austria was a State throughout.<sup>5</sup> On that view, governmental authority with respect to Austria was divided between the Austrian Government and the Allied Commission for Austria. It was not that, after 1945, Austria *qua* State was 'limited in her capacity for action under international law';<sup>6</sup> rather that the government of Austria was shared between different instrumentalities.

Ethiopia, also, had been invaded and annexed in violation of the Covenant and the Kellogg-Briand Pact.<sup>7</sup> The annexation had received some degree of recognition, but its nullity was in effect affirmed by the Peace Treaty with Italy.<sup>8</sup> Albania, where a puppet government had been established in union with Italy,<sup>9</sup> was also restored to independence, acts of the puppet government between 1939 and 1943 being recognized as null and void.<sup>10</sup>

However in each of these cases reconstitution of the State, under whatever auspices,<sup>11</sup> followed more or less directly upon the defeat of the Axis powers. The annexations of 1936-40 could only be regarded as effective *sub modo* while the conflict arising from the events of that period remained undecided. The difficulty then remains: how long could it be said that the legal identity of the State was preserved, despite its lack of effective control, in face of fully effective but illegal annexation? Post-1945 practice has been of little assistance in determining this issue, since illegal invasion of a State for the purpose of its annexation has not occurred with any frequency.<sup>12</sup> The most significant case, that of the Baltic States, sheds little light on the problem either.<sup>13</sup> On the whole, few

<sup>1</sup> *British and Foreign State Papers*, vol. 145, pp. 846, 850; *ibid.*, vol. 146, p. 504; Mair, in Royal Institute of International Affairs, *Four Power Control in Germany and Austria* (1956), Pt. II; Wheeler-Bennett and Nichols, *The Semblance of Peace. The Political Settlement after the Second World War* (1972), pp. 456-86.

<sup>2</sup> *United Nations Treaty Series*, vol. 217, p. 223, Art. 1. For the negotiations see Whiteman, *Digest*, vol. 3, pp. 437-68.

<sup>3</sup> Lemkin, *op. cit.* (above, p. 173 n. 3), p. 116 n. 36.

<sup>4</sup> Potsdam Proclamation, Pt. VII; *British and Foreign State Papers*, vol. 145, p. 852; Feis, *Between War and Peace. The Potsdam Conference* (1960), pp. 65-9, 274-9.

<sup>5</sup> Cf. 1946 Agreement, Art. 3; Clute, *op. cit.* (above, p. 173 n. 3), pp. 130-8.

<sup>6</sup> Brandweiner, in Lipsky (ed.), *Law and Politics in the World Community* (1953), pp. 221-42 at p. 225, describing Austria as a 'protected State'.

<sup>7</sup> *Supra*, p. 173 n. 2.

<sup>8</sup> *United Nations Treaty Series*, vol. 49, p. 747, Arts. 33-8, 74.

<sup>9</sup> *Supra*, p. 174 n. 1. Cf. *Case of Gold Looted by Germany from Rome in 1943*, I.L.R., 20 (1953), p. 441 at pp. 450-1; *Monetary Gold Removed from Rome*, I.C.J. Reports, 1954, p. 19.

<sup>10</sup> *United Nations Treaty Series*, vol. 49, p. 47, Arts. 27, 31, 74.

<sup>11</sup> For Poland after 1945 see *supra*, pp. 132 nn. 4, 5.

<sup>12</sup> Cf. Bot, *Non-Recognition and Treaty Relations* (1968), pp. 60-4. Hyderabad is probably the only instance: *supra*, p. 128 n. 2.

<sup>13</sup> On the Baltic States see Marek, *op. cit.* (above, p. 173 n. 2), pp. 369-416; Langer, *op. cit.*

States have so far recognized the annexation of the Baltic States; on the other hand, it is difficult to deny that their continued 'existence' is as much a matter of 'cold-war politics' as law.<sup>1</sup> Marek's conclusion would appear to be to similar effect: after referring to 'the survival of those States, whose physical suppression, although not assuming the orthodox form of belligerent occupation, proved equally temporary or transient', she states that

At the same time, the final loss of independence, either by way of a legal settlement or by way of a total obliteration of the entire international delimitation of a State, signified its extinction.<sup>2</sup>

If, on the other hand, it is concluded that continued recognition of Latvia, Lithuania and Estonia signifies their continued existence as States,<sup>3</sup> then it may be that the rule protecting State personality against illegal annexation has achieved relatively peremptory, permanent, force: the character as *jus cogens* of the rules relating to the use of force is no doubt relevant here.<sup>4</sup> The absence of more recent and explicit State practice is hardly regrettable; but it would seem to preclude any more conclusive assessment of the effect of continued effective but illegal annexation upon statehood. It may be said that the uncertainty of this position is common to that of prescription in general international law.<sup>5</sup> Equally, in view of the uncertainty of the position, the recognition practice assumes considerable importance.

## 5. OTHER CASES

### (i) Apartheid and the Bantustan policy

The question of the limits, if any, on the power of a State to grant independence to a portion of its territory—which power has hitherto been regarded as more or less unfettered—was raised squarely by the purported grant of independence by South Africa to the Transkei, on 26 October 1976.

(a) *Origins of the Transkei: The Bantustan policy.* The policy of 'separate development' of racial groups within South Africa is long-established: its ultimate extension was the dismemberment of areas of the Republic by the creation of self-governing 'Bantustans' which would then be granted independence. Such a process, it was thought, would justify the denationalization of those South Africans who historically belonged or were thought to belong to the

(above, p. 173 n. 2), pp. 262–70, 284; *Revue générale de droit international public*, 80 (1976), pp. 890–1.

<sup>1</sup> Cf. Jessup, *Transnational Law* (1956), p. 62; *In re De-Sautels*, 307 N.E. 2d. 576 (1974); *British Practice in International Law*, 1966, p. 82.

<sup>2</sup> *Identity and Continuity*, p. 589.

<sup>3</sup> Cf. Brownlie, *Principles*, pp. 82–3: 'illegal occupation cannot of itself terminate statehood . . . [W]hen elements of . . . *jus cogens* are involved, it is less likely that recognition and acquiescence will offset the original illegality'.

<sup>4</sup> Cf. *supra*, pp. 146–8.

<sup>5</sup> Cf. Johnson, this *Year Book*, 27 (1950), pp. 332–54; Radojkovic, in *Mélanges Andrassy* (1968), pp. 225–36.



ethnic group for which the Bantustan was formed.<sup>1</sup> The Transkei, for example, was accorded 'self-government' in 1963.<sup>2</sup> The South African Status of the Transkei Act, 1976<sup>3</sup> purported to grant independence to the Transkei. It provided:

(1) The territory known as the Transkei and consisting of the districts mentioned in Schedule A, is hereby declared to be a sovereign and independent state and shall cease to be part of the Republic of South Africa.

(2) The Republic of South Africa shall cease to exercise any authority over the said territory.<sup>4</sup>

The Act contains rather unusual provisions purporting to determine the citizenship of the Transkei,<sup>5</sup> and including in that 'grant' broad categories of former South African citizens with little or no effective link with the Transkei.<sup>6</sup> Quite apart from the doubtful legality of this form of mass deprivation of nationality, these provisions of the Act demonstrate with some clarity the racially discriminatory nature of the Bantustan policy, which is aimed at preserving the bulk of South Africa for its minority white population.<sup>7</sup> The South African Act also provides a procedure for resolution of disputes over the citizenship provisions.<sup>8</sup>

The South African Act, and the local Republic of Transkei Constitution Act, appear then, with one qualification, to vest full formal independence in the local authorities in the Transkei. That qualification relates to the citizenship provisions of the South African Act; it is a derogation from formal independence for another State to control the grant of nationality of a putative State. However, as a matter of local (Transkeian) law it is uncertain whether the South African

<sup>1</sup> For background to the Bantustan policy see Barber, *South Africa's Foreign Policy 1945-70* (1973), pp. 231-42; 'Report of the Special Committee on the Policies of *Apartheid* of the Government of the Republic of South Africa', *General Assembly, Official Records*, 18th Sess., A/5497 (1963), pp. 52-4; Hill, *Bantustans: the Fragmentation of South Africa* (1964). For discussion in the context of the 'independence' of the Bantustans see R. F. and H. J. Taubenfeld, *Race, Peace, Law, and Southern Africa* (New York, 1968), pp. 156-8. See also Sanders, *Comparative and International Law Journal of Southern Africa*, 9 (1976), pp. 356-64; and cf. *ibid.*, pp. 428-9.

<sup>2</sup> Transkei Constitution Act No. 48 of 1963; see Kahn, *South African Law Journal*, 80 (1963), pp. 473-82; Richings, *ibid.*, 93 (1976), pp. 119-126.

<sup>3</sup> *International Legal Materials*, 15 (1976), p. 1175.

<sup>4</sup> *Ibid.*, s. 1; and see *Keesing's Contemporary Archives*, 1976, pp. 28061-3.

<sup>5</sup> *Ibid.*, s. 6 (1), Schedule B.

<sup>6</sup> Paras. (f) and (g) of Schedule B purport to revoke the South African citizenship of, and to confer Transkeian citizenship on, anyone who 'speaks a language used by the Xhosa or Sotho speaking section of the population of the Transkei . . .' or who 'is related to any member of the population contemplated in paragraph (f) or has identified himself with any part of such population or is culturally or otherwise associated with any member or part of such population'.

<sup>7</sup> The Constitution of the Republic of Transkei (*International Legal Materials*, 15 (1976), p. 1136), Ch. 7, does not apparently confer automatic local nationality on all the persons referred to in Schedule B of the South African Act. S. 58 (2) provides that 'Any person, who has been found in the manner to be prescribed by or under an Act of Parliament, to be predominantly Xhosa-speaking or Sotho-speaking and to be a member of, or descended from, or ethnically, culturally or otherwise associated with, any tribe resident in a district of Transkei *shall be registered as and become a citizen of Transkei.*' This is ambiguous, but is apparently regarded as providing an option to register. Those not exercising the option, apparently, become stateless.

<sup>8</sup> S. 6 (2). Ss. 4, 5 provide in apparently peremptory form for devolution and continuation in force of various treaties and agreements with South Africa or other States.

Act has this effect: the Transkeian Legislative Assembly has plenary authority,<sup>1</sup> the validity of its legislation cannot be impugned in any court,<sup>2</sup> and the Constitution itself may be freely amended in the ordinary manner and form.<sup>3</sup> Whatever the correct interpretation of section 58 (2) of the Constitution, therefore, the local authorities seem to retain eventual control over who will be regarded as Transkeian nationals under Transkeian law.

The General Assembly has consistently condemned the Bantustan policy and asserted that no independent Bantustan would be recognized as a State. Thus Resolution 2775E (XXVI) of 29 November 1971 condemned

The establishment by the Government of South Africa of Bantu homelands (Bantustans) and the forcible removal of the African people of South Africa and Namibia to those areas as a violation of their inalienable rights, contrary to the principle of self-determination and prejudicial to the territorial integrity of the countries and the unity of their peoples.<sup>4</sup>

Resolution 3411D (XXX) of 28 November 1975 reaffirmed this position and 'Call[ed] upon all Governments and organizations not to deal with any institutions or authorities of the Bantustans or to accord any form of recognition to them'.<sup>5</sup> On 27 October 1976 the Assembly again condemned the Bantustan policy and rejected the 'independence' of the Transkei as 'invalid'.<sup>6</sup> Meanwhile the Organization of African Unity in July 1976 had invited 'all States . . . not to accord recognition to any Bantustan, in particular, the Transkei whose so-called independence is scheduled for the 26 October 1976'.<sup>7</sup> In fact no third State has, at the time of writing, recognized the Transkei.<sup>8</sup>

(b) *The status of the Transkei.* The status of the Transkei as an entity granted formal independence by the previous sovereign and claiming to be a State is thus squarely raised. The various resolutions and statements referred to, although unanimous in effect, are somewhat indistinct in their justification of the non-recognition of the Transkei—assuming, as seems clear, that such non-recognition goes to the status, or lack of it, of the entity in question. For example, Resolution 2775E (XXVI) refers to the principle of self-determination and to 'the territorial integrity of the countries and the unity of their peoples'. But self-determination, as we have seen,<sup>9</sup> has only a very limited and disputable application to independent metropolitan States: the incidents of the principle in such cases are negative—the duty of non-intervention—and hardly peremptory. Nor does practice demonstrate any general requirement that the government

<sup>1</sup> Constitution, s. 21.

<sup>2</sup> *Ibid.*, s. 21 (4).

<sup>3</sup> *Ibid.*, s. 75.

<sup>4</sup> Para. 1 (105-2:2). See also G.A. Resns. 2923E (XXVII), 15 November 1972, para. 2 (100-4:21); 3151G (XXVIII), 14 December 1973, para. 14 (88-7:28); 3324E (XXIX), 16 December 1974, para. 10 (95-13:14).

<sup>5</sup> G.A. Res. 3411D (XXX) (99-0:8).

<sup>6</sup> G.A. Res. 31/6A, para. 2 (134-0:1 (U.S.A.)). Para. 3 recommended that Governments 'deny any form of recognition to the so-called independent Transkei and . . . refrain from having any dealings with the so-called independent Transkei or other Bantustans'.

<sup>7</sup> O.A.U. Res. 493 (XXVII); *International Legal Materials*, 15 (1976), p. 1221.

<sup>8</sup> See, e.g., *Australian Foreign Affairs Review*, November 1976, pp. 591-5.

<sup>9</sup> *Supra*, pp. 152, 161.



of a metropolitan State be representative of its people (although it is of course for almost all purposes *the* representative of that people), or that it should act with respect to its population in accordance with the principle of self-determination.<sup>1</sup> The principle of 'territorial integrity' does not provide a permanent guarantee of present territorial divisions, nor does it preclude the granting of independence to a portion of the metropolitan territory, even where such a grant is contrary to the wishes of the majority of the people of the metropolitan State.<sup>2</sup>

The second justification for non-recognition generally given is that the Transkei lacks independence in view of its economic and political reliance on South Africa: thus the Organization of African Unity resolution referred to its 'fraudulent pseudo-independence'.<sup>3</sup> Where the creation of an entity is attended by serious illegalities, as seems to be the case here, it may be that the presumption in favour of the independence of entities granted full formal independence by the metropolitan State is displaced.<sup>4</sup> None the less, in cases of devolution the criterion of independence is predominantly formal, and there have been other cases of small States very substantially dependent on a former metropolis or third State.<sup>5</sup> It seems doubtful whether the difference in degree of actual dependence is very much greater in the present case.

But on balance it may be concluded that, as an entity the creation of which was attended by serious illegalities, which is not supported (as were the Congo,<sup>6</sup> Lesotho and so on) by the principle of self-determination, and which remains substantially dependent on South Africa for its subsistence, Transkei would seem not to be independent for the purpose of statehood in international law. However, in view of the relatively formal nature of the criterion of independence in these types of case, this judgment remains somewhat precarious; and it certainly could not justify the *permanent* and unequivocal non-recognition which the resolutions cited appear to contemplate.

The third possible justification for non-recognition is that the Transkei, as an entity created directly pursuant to a fundamentally illegal policy of *apartheid*, is for that reason, and irrespective of its degree of formal or actual effectiveness, not a State. As we have seen, some such rule as this may be justifiable with respect to self-determination,<sup>7</sup> and the illegal use of force.<sup>8</sup> The relevance of the concept of *jus cogens* in this context has also been referred to.<sup>9</sup> *Apartheid* as such, a particular institution adopted in one country, is

<sup>1</sup> *Supra*, pp. 149-50.

<sup>2</sup> This was probably so with the Irish Free State: *supra*, p. 135 n. 3. Many other examples might be given.

<sup>3</sup> O.A.U. Res. 493 (XXVII), para. 4. G.A. Res. 31/6A also referred to its independence as 'sham'.

<sup>4</sup> *Supra*, p. 135.

<sup>5</sup> The Transkei is 43,798 square km. in area. It imports about 90 per cent of its food supplies, and is heavily reliant on remittances from workers in the Republic of South Africa for its national income. But it has a sea-coast, and unlike some of the Bantustans has a relatively coherent territory.

<sup>6</sup> *Supra*, pp. 106-7.

<sup>7</sup> *Supra*, pp. 161-4.

<sup>8</sup> *Supra*, pp. 172-3.

<sup>9</sup> *Supra*, pp. 144-8.



probably not illegal as a matter of customary international law;<sup>1</sup> but it provides a clear case of a policy predicated on a fundamental denial of equality on the grounds of race or ethnic origin.<sup>2</sup> There is considerable support for the principle of racial equality and non-discrimination as a principle of general international law and even of *jus cogens*.<sup>3</sup> It is clear (and apparent from Schedule B of the South African Act itself) that the creation of the Transkei was an integral part of a policy which violates this fundamental principle.<sup>4</sup> It may therefore be that a further fundamental criterion of legality regulating the creation of States has been added to those discussed earlier in this study; although in view of the rather generalized formulations of the non-recognition policy so far, and of the availability of another ground of non-acceptance of the Transkei as a State, this conclusion is necessarily tentative.

## (ii) *Puppet States and the 1949 Geneva Convention*

Article 47 of the Third Convention relative to the Protection of Civilian Persons in Time of War (concluded to remedy evasion of the previous law through the use of puppet local authorities) provides that

Protected Persons who are in occupied territory shall not be deprived . . . of the benefits of the present Convention by any change introduced, as a result of the occupation of a territory, into the institutions of government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power . . .<sup>5</sup>

Marek accordingly argues that 'the Geneva Convention has positively outlawed the creation of puppets as a means of indirectly violating the international occupation regime. It has branded them as illegal'.<sup>6</sup> This seems rather too categorical. Although such puppets (whether 'States' or 'governments') have no more governmental authority than the belligerent occupant itself, that does not mean that, within the limits of the Hague and Geneva Conventions, the action of such a regime as an organ or agent of the occupant may not be valid.

It is thus doubtful whether Article 47 establishes any categorical rule prohibiting

<sup>1</sup> For the International Convention on the Suppression and Punishment of the Crime of *Apartheid*, annexed to G.A. Res. 3068 (XXVIII), 30 November 1973 (91-4:26), see *International Legal Materials*, 13 (1974), p. 50. The Convention came into force on 18 July 1976: *International Legal Materials*, 15 (1976), p. 983. It makes no express reference to the Bantustans: but cf. Art. 2 (c).

<sup>2</sup> The important International Convention on the Elimination of all Forms of Racial Discrimination, 1966 (*United Nations Treaty Series*, vol. 660, p. 195) expressly and particularly prohibits 'racial segregation and apartheid' (Art. 3). As at 31 December 1975 there were eighty-seven parties to the Convention.

<sup>3</sup> See especially Judge Tanaka, dissenting, *South West Africa cases (Second Phase)*, *I.C.J. Reports*, 1966, p. 6 at pp. 284-316; Brownlie, *Principles*, pp. 578-80 and works there cited. See also the interesting account by Dugard, *Acta Juridica*, 1974, pp. 220-7.

<sup>4</sup> That racial equality and non-discrimination is observed *within* the Transkei is, of course, not to the point: the illegality relates to the non-observance of the principle within South Africa as a whole, and in the very act of creation of the Transkei which was an aspect of that non-observance. And see further Norman, *New England Law Review*, 12 (1977), pp. 585-646.

<sup>5</sup> *United Nations Treaty Series*, vol. 75, p. 287.

<sup>6</sup> *Identity and Continuity*, p. 120.

puppet entities from being created, or from achieving real independence over a period of time. And this view is confirmed by the commentators on the Conventions.<sup>1</sup>

(iii) *Violation of conventional stipulations providing for independence*

Multilateral treaties, whether peace or armistice agreements or international 'constitutional' treaties such as the Covenant and the Charter, frequently provide for the independence of certain territories either immediately or contingently. Where the territory concerned claims independence but the relevant treaty provisions are not complied with, complex problems arise. In general, a distinction must be made between formal or procedural violations, and violations of material provisions, and in particular of the purposes for or basic conditions upon which independence is to be granted. In the former case it seems that violations will not affect statehood provided genuine independence is attained.<sup>2</sup> In the latter case, the presumption may well be against statehood in the absence of compliance with the relevant provisions. Moreover, where the treaty is of such a kind that it creates a form of regime extending beyond the immediate parties, it may even be that no entity created in violation of material provisions of the treaty will be recognized as a State. For example, South Africa could not on this view evade its responsibilities towards Namibia by the grant of independence to a minority regime there. However, the matter depends to a considerable extent upon the relevant instruments in each case.

(iv) *Entities not claiming to be States*

Statehood can be described as a claim of right based on a certain factual situation. The case of Formosa raises the interesting possibility that an entity which does not claim to be a State, even though it might otherwise qualify for statehood in accordance with the basic criteria, will not be regarded as a State.<sup>3</sup>

## 6. CONCLUSION

It has been argued that international law does contain workable rules for determining whether a given entity is or is not a State. Of course, these rules are not, so to speak, self-executing: as with rules in other areas of international law, their application by international lawyers, or by States and other international persons, requires the exercise of judgment in each case. But to say

<sup>1</sup> International Committee of the Red Cross, *Commentary* (1958), vol. 4, pp. 272-4; Draper, *The Red Cross Conventions* (1958), pp. 38-9; U.S., Dept. of the Army, *Field Manual FM 27-10* (1956), § 366.

<sup>2</sup> Cf. the cases of Syria and Lebanon in 1944: *supra*, pp. 135-7. Non-observance of the procedures for termination of the Mandate regime was not regarded as relevant, provided effective independence had been granted to the people of the territories concerned, in accordance with the basic principles of the Mandate system. Cf. *Foreign Relations of the United States*, 1942-IV, pp. 647-8, 665; *ibid.*, 1943-IV, pp. 966, 987, 1007; *ibid.*, 1944-V, pp. 774, 782, 785, 795-7; *ibid.*, 1945-VIII, p. 1197.

<sup>3</sup> On Formosa see the works cited *supra*, p. 93 n. 9. Andorra is another possible case of an entity not claiming statehood: *supra*, p. 129 n. 6.

this is not to assert that any process of 'recognition', whether the formal usage of diplomatic practice or some more informal act, is creative of the legal personality of the entity in question. The point is that under the criteria discussed here there *are* clear, central cases. It is the chief perception of the 'declaratory' school of recognition that the alternative view reduces every case to being marginal and thus, in a very fundamental way, has a destabilizing effect in international relations and is destructive of the coherence of international law. On the other hand, the more subtle adherents of the 'constitutive' theory saw that the equation of statehood with 'fact' was a serious oversimplification, and that in any case the international community need not necessarily be bound to accept every effective territorial entity as a State, with all that that implies, no matter how violative of fundamental rules of law the creation of the entity in question.<sup>1</sup> It is submitted that recent developments, divorced from the polemics of the doctrinal dispute over 'recognition', have to some degree at least incorporated the basic insights of both positions, and have thus contributed to the progressive development of international law.

<sup>1</sup> Cf. Lauterpacht, cited *supra*, p. 148 n 2.



# SIR GERALD FITZMAURICE'S CONTRIBUTION TO THE JURISPRUDENCE OF THE INTERNATIONAL COURT OF JUSTICE\*

By J. G. MERRILLS<sup>1</sup>

SIR Gerald Fitzmaurice was elected to the International Court in 1960, an appointment occasioned by the untimely death of Sir Hersch Lauterpacht, whose outstanding contribution to the Court Fitzmaurice has described in earlier volumes of this *Year Book*.<sup>2</sup> In 1973, Fitzmaurice retired from the Court, having himself made a distinctive contribution to its jurisprudence. What follows is an assessment of that contribution.

It is not an assessment of Fitzmaurice's work as a scholar, because he still has much to write,<sup>3</sup> nor even as a Judge, for he is still a Judge of the European Court of Human Rights and has only recently been President of the Court of Arbitration in the *Beagle Channel* case between Argentina and Chile. However, a study of Fitzmaurice's individual opinions as a Judge at The Hague, could, it was thought, be justified because Fitzmaurice's membership of the Court coincided with the most turbulent period in its history, when a number of formidable legal and political issues provided an exceptional opportunity to contribute to the exposition and development of the law.

In the thirteen years in which Fitzmaurice was a member, the International Court gave ten decisions in contentious cases and two advisory opinions. He participated in all these cases and was also present when in 1971 the Court made a number of orders relating to its composition for the advisory opinion in the *Namibia* case and in 1972 when it made interim protection orders in the *Fisheries Jurisdiction* cases. In the *North Sea Continental Shelf* cases, the *Appeal relating to the I.C.A.O. Council* case, the first stage of the *Barcelona Traction* case and the second stage of the *South West Africa* cases, Fitzmaurice voted with the majority without delivering an individual opinion. He similarly supported the orders in the *Fisheries Jurisdiction* cases and two of the orders in the *Namibia* case.

Fitzmaurice expressed an individual point of view, either alone, or in conjunction with colleagues, in eight cases and in one of the orders in the *Namibia* case. At the first stage of the *Temple* case he made a joint concurring declaration with Judge Tanaka and at the hearing of the merits delivered a separate opinion.

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<sup>2</sup> This *Year Book*, 37 (1961), p. 1; *ibid.*, 38 (1962), p. 1; *ibid.*, 39 (1963), p. 133.

<sup>3</sup> In addition to his three articles on Lauterpacht, Fitzmaurice published an analysis of the recent work of the International Court in each volume of this *Year Book* from 1950 to 1959 inclusive. References to these and other writings will be found below. Fitzmaurice's lectures at The Hague Academy will be found in *Recueil des cours*, 92 (1957-II), which also contains a bibliography.

He also delivered separate opinions in the *Expenses* case, the *Northern Cameroons* case, the first stage of the *Fisheries Jurisdiction* cases and the second stage of the *Barcelona Traction* case. On the three occasions on which Fitzmaurice failed to vote with the majority, some aspect of the complex South West Africa situation was in issue, and he gave a reasoned dissent. In the 1962 *South West Africa* cases, he joined with Sir Percy Spender to produce a long and elaborately argued dissenting opinion, challenging the view of a bare majority of the Court, that Article 7 of the Mandate for South West Africa gave the Court jurisdiction to hear the case brought by Ethiopia and Liberia in respect of South Africa's performance of the Mandate. In 1971 he joined with Judge Gros and Judge Petrén in a dissenting declaration, opposing the Court's refusal to allow the appointment of a South African judge *ad hoc* for the *Namibia* advisory opinion, and in that case he delivered a long dissenting opinion, challenging the Court's view that the Mandate for South West Africa had been validly terminated by the General Assembly.

### STYLE AND CONTENT

Fitzmaurice's individual opinions fill almost 350 pages of the reports with a wealth of material on all aspects of international law. They vary in length from more than 100 pages to less than two. Long or short, they are closely argued and rigorously reasoned. As lucid and scholarly expositions of international law, they show both a concern for the precise use of legal language and an awareness of the value of the humorous allusion, in short, the best features of the English judicial style.<sup>1</sup>

Fitzmaurice has definite ideas about the ground which should be covered in an international judgment and, in particular, how far it is desirable to go into matters not strictly necessary to the decision. Here he drew a distinction between jurisdictional and substantive issues.

At the first stage of the *Temple* case Cambodia sought to base the Court's jurisdiction on declarations under Article 36 (2) of the Statute, made by herself and Thailand, and on certain treaties between France and Thailand, dating from the inter-war period. For reasons which will be examined later, the Court held that the Optional Clause declarations were an effective basis of jurisdiction and in view of this declined to examine Thailand's argument that the treaties were not. In his joint declaration with Judge Tanaka, Fitzmaurice agreed that in the circumstances this was the proper approach to the alternative basis of jurisdiction.<sup>2</sup> Whilst the two judges accepted Sir Hersch Lauterpacht's frequently expressed opinion that the basic issues in a case should always be dealt with by the Court, whether or not they could affect its conclusion, they considered, as he did, that jurisdiction was a special issue for which no such review was required.

<sup>1</sup> A forceful expression of Fitzmaurice's concern for plain speaking may be found in his comments upon Professor McDougal's work on treaty interpretation in *American Journal of International Law*, 65 (1971), p. 358.

<sup>2</sup> *I.C.J. Reports*, 1961, p. 38.

In practice, this self-denying ordinance has been much less significant than Fitzmaurice's belief that the international judge must always examine the main substantive issues, a view which he expressed on several occasions. In the *Barcelona Traction* case, for instance, he again endorsed Lauterpacht's view that international tribunals should treat the issues broadly and justified this by the need to develop international law, observing that: 'Since specific legislative action with direct binding effect is not at present possible in the international legal field, judicial pronouncements of one kind or another constitute the principal method by which the law can find some concrete measure of clarification and development.'<sup>1</sup> As a consequence, Fitzmaurice, like Lauterpacht, frequently used his separate opinions to express his own understanding of areas of international law about which the Court's judgment had little or nothing to say.

For international courts and for the individual members of such tribunals in particular, the complex subject-matter of international litigation is often a deterrent to such wide-ranging surveys. *Barcelona Traction*, which involved a great number of separate issues and exceptionally complex facts, raised the problem in an acute form. Fitzmaurice's solution was to draw a distinction between judicial findings and mere expressions of view. Thus, after dealing with the main issue of *locus standi*, he prefaced his review of a number of other issues by saying:

... although I shall be expressing a judicial *view* on the points of the law involved, and possibly also on some points of fact, I do not wish to be understood (even though I may use the language of it) as making any judicial *pronouncements* or findings on them. These were matters which, although the Court considered them, it did not need for the particular purposes of the Judgment to go into fully. Had a more ample collegiate discussion taken place I might have been led to form a different opinion on some points, and therefore it is by way of analysis that I now give my views.<sup>2</sup>

The view that a judgment can be constructed of different layers of legal material is not, of course, untraditional. As Fitzmaurice noted at the beginning of his opinion, it is simply another way of expressing the familiar distinction between *ratio decidendi* and *obiter dictum*. Yet formalizing the distinction, as Fitzmaurice did here, may have advantages, if it can help to overcome the natural reluctance to state a point of view that reflection may show to be mistaken and the consequent tendency to place decisions on the narrowest possible ground.

It is clear that Fitzmaurice's urge to investigate the issues in a more or less authoritative manner stemmed from more than a desire to contribute to the development of international law. In two cases, though his opinions certainly had that effect, his primary objective was to ensure that the case was decided by reference to findings rather than assumptions as to the legal position, and he firmly repudiated the view that the Court could proceed by hypothesis and as a matter of policy leave important issues undecided. In the *Barcelona Traction*

<sup>1</sup> *I.C.J. Reports*, 1970, p. 65. Fitzmaurice has recorded elsewhere how Sir Eric Beckett took a similar view: see Fitzmaurice and Vallat, *International and Comparative Law Quarterly*, 17 (1968), p. 267 at pp. 316-18.

<sup>2</sup> *I.C.J. Reports*, 1970, p. 86.



case neither Spain nor Belgium disputed the Canadian nationality of the Barcelona Traction company, or Canada's hypothetical right to exercise diplomatic protection on its behalf. In Fitzmaurice's view, however, the company's tenuous links with Canada should have caused the Court to consider both the relevance of the *Nottebohm* case<sup>1</sup> to the right of diplomatic protection on these facts and the true nationality of the company.<sup>2</sup> Similarly in the *Namibia* case, as we shall see, he held that it would be wrong to proceed on the assumption that certain General Assembly resolutions were valid without investigating the matter, despite the fact that the request for an advisory opinion appeared to require the Court to make exactly that assumption.<sup>3</sup>

No one reading Fitzmaurice's separate opinions can fail to notice how frequently he discussed and upheld the arguments of the unsuccessful party. This practice, which was in sharp contrast to that of the Court, is accounted for by Fitzmaurice's view that the duties of the international judge are not simply to decide the case, or even to advance international law, but to satisfy the litigant. Like his distinguished predecessor,<sup>4</sup> Fitzmaurice believes that if in most lawsuits there must be a winner and a loser, the unsuccessful party should at least have the satisfaction of seeing the Court consider his case and, to the extent that his contentions are sound, uphold them. Among the numerous examples of Fitzmaurice's putting this principle into practice are his finding at the second stage of the *Temple* case that Thailand's evidence of the relevant frontier geography was more persuasive than Cambodia's;<sup>5</sup> his decision in the *Northern Cameroons* case, upholding the argument of the Republic of Cameroon that disputes relating to the termination of the Trust Agreement were within the Court's jurisdiction,<sup>6</sup> and his suggestion in the *Barcelona Traction* case that Belgium was correct in her contention that the vesting of the company's shares in American trustees was not in itself fatal to her claim.<sup>7</sup> In each of these cases, which will be examined in detail later, Fitzmaurice upheld an argument of the party whose case he ultimately rejected. If to the common lawyer this seems unremarkable, it is worth remembering that States' reluctance to bring cases to the Court is often attributed to a lack of confidence in its decisions. To the extent that this is so, the explicit examination of the contentions of both sides must be considered a step in the right direction.

## JURISDICTION

### (a) *The consensual basis of the Court's jurisdiction*

Questions concerning the scope of the Court's jurisdiction feature prominently in a majority of Fitzmaurice's individual opinions. The consensual basis of that

<sup>1</sup> *Nottebohm (Second Phase)*, Judgment, *I.C.J. Reports*, 1955, p. 4.

<sup>2</sup> *I.C.J. Reports*, 1970, pp. 79-82.

<sup>3</sup> *I.C.J. Reports*, 1971, pp. 301-4. Cf. the view on the *non ultra petita* rule Fitzmaurice expressed in this *Year Book*, 34 (1958), p. 99.

<sup>4</sup> Lauterpacht's views on this matter are described by Fitzmaurice in this *Year Book*, 37 (1961), pp. 7-9.

<sup>6</sup> *I.C.J. Reports*, 1963, pp. 118, 119.

<sup>5</sup> *I.C.J. Reports*, 1962, p. 66.

<sup>7</sup> *I.C.J. Reports*, 1970, pp. 93-9.

jurisdiction, which Fitzmaurice had examined before he became a judge,<sup>1</sup> received particular emphasis in his joint dissenting opinion in the *South West Africa* cases, where he suggested that a failure to appreciate the fundamental importance of consent had led the Court to construe its jurisdiction too broadly. In the view of Spender and Fitzmaurice the principle of consent demanded that any doubts in respect of the question of jurisdiction should always be resolved in favour of the respondent:

. . . quite apart from any question of onus of proof, a duty lies upon the Court, before it may assume jurisdiction, to be conclusively satisfied—satisfied beyond a reasonable doubt—that jurisdiction does exist. If a reasonable doubt—and still more if a very serious doubt, to put it no higher—is revealed as existing, then, because of the principle of consent as the indispensable foundation of international jurisdiction, the conclusion would have to be reached that jurisdiction is not established.<sup>2</sup>

It is clear that Fitzmaurice took this view because he has always tended to regard judicial settlement from the standpoint of a respondent State and its expectation of a fair interpretation of its legal acts.<sup>3</sup> In relation to the jurisdictional issues in this case, this emphasis on the need to demonstrate conclusively that the respondent had accepted the Court's jurisdiction led Spender and Fitzmaurice to reject the broad construction of Article 7 of the Mandate, favoured by the majority. But the issue of legal policy raised here clearly transcends the particular case. For Fitzmaurice's emphasis on the critical element of consent contrasts sharply with the view that a broad interpretation of legal powers can be justified by the political consequences of a judgment. This radical doctrine can be seen in both the 1962 *South West Africa* decision and the *Namibia* advisory opinion, and, as we shall see, in each of those cases Fitzmaurice's repudiation of that doctrine was the point of departure for his dissent.

#### (b) *Transference of jurisdiction from the Permanent Court to the International Court*

When the present International Court of Justice replaced the earlier Permanent Court, steps were taken to ensure that acceptances of the jurisdiction of the old court would operate as acceptances of the jurisdiction of its successor without the need for special acts on the part of States. Two provisions of the Court's Statute provided for this transferred jurisdiction. Article 36 (5) provided for the continuation of declarations under Article 36 (2) of the Statute (the Optional

<sup>1</sup> See, for example, this *Year Book*, 34 (1958), pp. 66–99.

<sup>2</sup> *I.C.J. Reports*, 1962, pp. 473–4.

<sup>3</sup> '... in the writer's experience there are few things that induce such a strong sense of grievance in States as losing a case on a jurisdictional objection, if there is any room for serious doubt as to whether the jurisdictional objection has really been assumed, or relates to the dispute in question. . . . The reason is not far to seek. . . . It turns on the risks the State concerned feels it can fairly be held to have accepted. If there is little real doubt that the jurisdictional obligation was or can reasonably be regarded as having been assumed, the normal feeling will be that the risk of an adverse decision on the merits of a dispute *covered by that obligation* was and must be accepted. It is far otherwise if it is felt that the jurisdictional obligation itself was never really assumed in relation to that dispute, or has only been stretched to cover it by a dubious or artificial process of inference or extension': Fitzmaurice, this *Year Book*, 38 (1962), p. 42 (original emphasis).



Clause) and Article 37 provided for the substitution of the International Court for the Permanent Court in adjudication clauses in treaties or conventions in force.

In two of the cases in which he delivered individual opinions Fitzmaurice considered the scope of these provisions. In the *Temple* case the issue was the scope of Article 36 (5); in the *South West Africa* cases two of South Africa's preliminary objections required an interpretation of Article 37.

In the *Temple* case Cambodia sought to base the Court's jurisdiction on, *inter alia*, her declaration under Article 36 (2) of the Statute and a similar declaration made by Thailand in 1950. Thailand raised a preliminary objection disputing the validity of the 1950 declaration. Her argument was that in that declaration she had sought to renew a declaration of 1940, accepting the jurisdiction of the Permanent Court, but that since the International Court's decision in the 1959 *Israel v. Bulgaria Aerial Incident* case<sup>1</sup> it was clear that such renewal was impossible. This was because in the *Aerial Incident* decision the Court had held that Article 36 (5) of the Statute transformed declarations accepting the jurisdiction of the Permanent Court into acceptances of the jurisdiction of its successor only for those States which were members of the United Nations, and therefore parties to the Statute, on 19 April 1946, the date of the demise of the Permanent Court. For States which, like Thailand, were not members of the United Nations at that date, acceptances of the Permanent Court's jurisdiction immediately lapsed and therefore could not be subsequently renewed.

The Court was unanimous in rejecting Thailand's argument, holding that in 1950 it had been Thailand's intention to accept the compulsory jurisdiction of the Court and that in these circumstances her misunderstanding of the legal situation had no bearing on the validity of the declaration, which took effect as a new and effective declaration under Article 36 (2).

In his joint declaration with Judge Tanaka, Fitzmaurice expressed his complete agreement with the reasoning and conclusion of the Court, but added some important comments on the interpretation of Article 36 (5). In the 1959 *Aerial Incident* case three of the dissenting judges had rejected the Court's view that Article 36 (5) operated in a once-and-for-all way on 19 April 1946, holding instead that for States joining the United Nations after that date Article 36 (5) had the effect of transforming into an acceptance of the Court's jurisdiction any declaration which would have been effective had the Permanent Court still existed.<sup>2</sup> In the *Temple* case Fitzmaurice and Tanaka took the same view, adopting for this purpose the arguments to be found in the dissenting opinions in the *Aerial Incident* case. As their joint declaration explained, this view of Article 36 (5) furnished an additional and more immediate reason for rejecting Thailand's objection.<sup>3</sup>

Although the transitional character of Article 36 (5) has made its correct

<sup>1</sup> *Aerial Incident of 27th July 1955 (Israel v. Bulgaria)*, Judgment, *I.C.J. Reports*, 1959, p. 127.

<sup>2</sup> The dissenting judges included Sir Hersch Lauterpacht, whose views of this question Fitzmaurice discussed in this *Year Book*, 38 (1962), pp. 38-48.

<sup>3</sup> See *I.C.J. Reports*, 1961, pp. 36-8.



interpretation a matter of diminishing practical importance, Fitzmaurice's view that this and the other provisions of the Court's statute must be interpreted by a careful analysis of their drafting history is a point of general importance. Another, which it is appropriate to mention here, is his extra-judicial explanation that the narrow construction of the words 'in force' in this article is based on the clear aim of the Statute and not, as Lauterpacht had suggested, on any general presumption as to the meaning of the phrase.<sup>1</sup>

Interpretation of Article 37 of the Statute was required by the first preliminary objection raised by South Africa in the 1962 *South West Africa* cases. Article 37 provides that:

Whenever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice.

By a bare majority the Court decided that the Mandate for South West Africa was a 'treaty or convention in force' for the purposes of this article and hence could be invoked by the Applicants as the basis for the Court's jurisdiction. In their joint dissenting opinion Spender and Fitzmaurice disagreed, holding that if Article 37 was interpreted literally, the Mandate fell outside its scope, because it lacked the essential characteristics of a treaty or convention and could not be considered to be still in force.

Spender and Fitzmaurice held that like Article 36 (1) of the Statute, Article 37 must be taken to refer to treaties or conventions in the traditional sense. In particular such agreements had to be 'in written form' and 'concluded between two or more States or other subjects of international law'.<sup>2</sup> Thus verbal agreements, statements of intention or unilateral acts, though they might give rise to legal obligations, could not be regarded as 'treaties or conventions'. Declarations under Article 36 (2) of the Court's Statute were similarly excluded, though they might be regarded as having a 'quasi-treaty character' by virtue of their interlocking nature. Spender and Fitzmaurice explained that the Court appeared to regard the creation of international obligations as sufficient evidence of an international agreement for the purposes of Article 37, whereas in their view:

... the test is not, or is not merely, the creation of international obligations, *but the character of the Act or instrument that gives those obligations their legal force.*<sup>3</sup>

Applying this test to the Mandate, Spender and Fitzmaurice sought to show that a detailed investigation of the historical circumstances surrounding the creation of the Mandates system indicated that although there were 'consensual elements' behind the Resolution of the Council of the League which created the Mandate for South West Africa, these were not sufficient to turn the arrangement into an international agreement.

<sup>1</sup> Op. cit. (above, p. 188 n. 2), pp. 45-7.

<sup>2</sup> *I.C.J. Reports*, 1962, p. 475; the words are taken from the International Law Commission's final draft on the Conclusion, Entry into Force and Registration of Treaties (1962).

<sup>3</sup> *Ibid.*, p. 477.

Article 22 of the League Covenant was, of course, part of a treaty, but that Article created only the Mandates system. The individual mandates had been created by Resolution of the League Council and this must be regarded as a 'quasi-legislative act of the League Council',<sup>1</sup> not an international agreement. Spender and Fitzmaurice regarded this as a crucial distinction because 'the fact that an act is done under an authority contained in an instrument which is itself a treaty . . . does not *per se* give the resulting act a treaty character'.<sup>2</sup> Nor was it relevant that behind the Mandate lay a general agreement as to its terms because 'the test . . . must be, not whether certain background consents or understandings or agreements existed, nor whether international obligations were created, *but what was the character of the act or instrument that gave those obligations their legal force*'.<sup>3</sup>

Turning to the question whether if the Mandate was a 'treaty or convention' it could be considered to be 'in force', Spender and Fitzmaurice distinguished between the Mandate as an institution and the Mandate as a (supposed) international agreement. In their view the advisory opinion in the 1950 *Status of South West Africa* case<sup>4</sup> did no more than hold that the Mandate, as an institution, had survived the demise of the League of Nations. Whether it had survived *as a treaty*, assuming that it originally had that character, depended on whether a party or parties to the arrangement other than South Africa could still be identified. In their view no such parties could be found. The Principal Allied and Associated Powers could not be considered original parties to the arrangement and so could not be parties to it now. The Members of the League were not parties in their individual capacities, as the Preamble to the Mandate and the lack of any formal process of signature and ratification made clear, and no argument that the Council had acted as agent for individual Members could be sustained. The League, or the Council of the League, might perhaps have been an original party, though the treaty-making powers of international organizations were unclear at the critical date, but as neither still existed, the Mandate could not today be in force as an agreement between such a party and South Africa.

The view that the Mandate could not be regarded as a 'treaty or convention in force' within the meaning of Article 37 received support from Judges Basdevant and Spiropoulos,<sup>5</sup> and the Spender/Fitzmaurice opinion is an undeniably impressive analysis of a difficult issue. That a scarcely less persuasive contrary case can be made, however, is sufficiently indicated by the fact that twelve years before, in his separate opinion in the *Status of South West Africa* case, Lord McNair had unhesitatingly accepted the argument which formed the basis of the Court's judgment in the 1962 case.<sup>6</sup>

The scope of Article 37 was also in issue in South Africa's second preliminary objection. The question here was whether the applicant States, Ethiopia and Liberia, qualified as 'Members of the League' for the purposes of Article 7 of

<sup>1</sup> *I.C.J. Reports*, 1962, p. 490.

<sup>2</sup> *Ibid.*, p. 491.

<sup>3</sup> *Ibid.* (original emphasis).

<sup>4</sup> *International Status of South West Africa*, Advisory Opinion, *I.C.J. Reports*, 1950, p. 128.

<sup>5</sup> *I.C.J. Reports*, 1962, pp. 460-2 and 346-7 respectively.

<sup>6</sup> *I.C.J. Reports*, 1950, pp. 158-9.



the Mandate, which gave access to the Court only to States so qualified. The Court's decision was that the Applicants qualified because, although the League no longer existed, the judicial protection embodied in Article 7 was an essential feature of the Mandates System, the right of Members of the League to implead the Mandatory Power was originally included as a procedure for ensuring judicial protection, regardless of the fate of the rest of the supervisory machinery and, finally, because in the Court's view at its final session in 1946 the Members of the League Assembly had agreed to maintain their rights in respect of the Mandate.<sup>1</sup>

Again Spender and Fitzmaurice disagreed. Their starting-point was that Article 37 had a procedural, not a substantive, character:

It is clear that Article 37 of the Statute cannot operate so as to substitute the present Court for the former Permanent Court *in a case in which that Court could not have had jurisdiction*. It does not operate so as to increase jurisdiction. It merely substitutes for a reference to the Permanent Court a reference to this Court. It cannot, and does not, of itself determine whether, in the given case, that Court would in fact have been competent.<sup>2</sup>

From this it followed that the main issue was whether the Permanent Court would have had jurisdiction in the present circumstances. To that the answer was no, because the Applicants were not currently Members of the League. It was true that the Applicants were *former* Members of the League, but as a matter of principle:

... in the absence of express provision to the contrary, rights conferred on or exercisable by a person or entity in a specified capacity, or as a member of a specified class, cannot be exercised in another capacity, or as a member of another class, or continue to be exercised if the specified capacity is lost or membership of the class ceases.<sup>3</sup>

In applying this principle to the South West Africa situation, Spender and Fitzmaurice admitted that they were again departing from the view expressed by Lord McNair in the 1950 case. In their view, however, Article 7 could be construed in no other way. Members of the League clearly lost the right to invoke Article 7 if they left the organization during the period of its existence. The Applicants were in a comparable position because their non-membership was the result of a collective decision to wind up the organization. Article 7 must be strictly construed because the broad interpretation favoured by the Court would serve to increase the Mandatory's burden, since the Charter procedures for enforcing a judgment of the Court were broader than the comparable provisions of the League Covenant.

### (c) *Judicial supervision of Mandates and Trust Territories*

League of Nations Mandates and United Nations Trusteeship Agreements commonly include a provision entitling Members of the organization to take

<sup>1</sup> *I.C.J. Reports*, 1962, pp. 335-42.

<sup>2</sup> *Ibid.*, p. 505.      <sup>3</sup> *Ibid.*, p. 507.



disputes with the State responsible for the territory to the World Court. In the *South West Africa* cases, where the point was directly in issue, and the *Northern Cameroons* case, where a decision on the point was not strictly speaking necessary, Fitzmaurice examined the scope of two such provisions, Article 7 of the Mandate and Article 19 of the Trusteeship Agreement for the Cameroons. In each case the question was how far these articles entitled a Member State to initiate litigation in respect of the respondent State's obligation to further the interests of the inhabitants of the territory.

In the *South West Africa* cases one of the issues raised by South Africa's third preliminary objection was whether, assuming that the Applicants still qualified as 'Members of the League of Nations', their dispute with South Africa, if one existed, was of the type contemplated by Article 7 of the Mandate and so within the Court's jurisdiction. The Court held that it was, finding that the reference in Article 7 to 'any dispute whatever . . . relating to the interpretation or the application of the provisions of the Mandate' must be interpreted literally, in view of the crucial role assigned to judicial protection of the arrangements in the Mandate. In their joint dissenting opinion Spender and Fitzmaurice disagreed.<sup>1</sup> In their view Article 7 was designed to allow States to protect only 'national rights', i.e. the special interests conferred by those provisions of the Mandate which had been inserted for the benefit of Members of the League and their nationals, such as commercial rights, and had no application to those provisions of the Mandate designed to further the interests of the inhabitants of the mandated territory.

This narrow reading of Article 7 was justified by pointing to the requirement that to fall within the Article disputes must be such as 'cannot be settled by negotiation'. Since there could be no question of individual Members of the League finally settling matters relating to the conduct of the Mandate through bilateral dealings with the Mandatory, it followed that the disputes contemplated by Article 7 must be those that could be so settled, that is matters affecting the individual rights of States, not those concerned with the interests of the inhabitants of the territory. Nor could the broader reading be reconciled with the supervisory powers of the League Council in Article 6, because if Article 7 empowered individual States to take general questions relating to the Mandate to the Court, a conflict might arise between the Court and the Council as to how the Mandatory's obligations might be fulfilled. Confirmation of the narrower reading of Article 7 was in the view of Spender and Fitzmaurice to be found in a detailed study of the *travaux préparatoires*, which altogether failed to indicate that it was the intention of the 1919 Paris Peace Conference to invest Article 7 with the broad significance posited by the Applicants.

The approach to Article 7 adopted by Spender and Fitzmaurice in the 1962 case was, of course, vindicated when, following a crucial change in its membership, the 1966 Court rejected the Applicants' case for lack of *ius standi*.<sup>2</sup> On that occasion Fitzmaurice voted with the majority and did not write an individual

<sup>1</sup> *I.C.J. Reports*, 1962, pp. 547-60.

<sup>2</sup> *South West Africa (Second Phase)*, Judgment, *I.C.J. Reports*, 1966, p. 6.

opinion, presumably on the ground that the views to be found in the judgment corresponded to his own.

In less dramatic circumstances, however, Fitzmaurice had already examined a rather similar issue, when in his separate opinion in the *Northern Cameroons* case he had discussed the interpretation of Article 19 of the Trust Agreement for the Cameroons. The terms of that article were virtually identical to those of Article 7 of the Mandate, and Fitzmaurice's approach to its interpretation corresponded to his argument in the 1962 case. In Fitzmaurice's view the first governing principle was that jurisdictional clauses never confer substantive rights:

... whatever the apparent generality of its language ... a purely jurisdictional clause, such as Article 19 of the Trust Agreement, cannot confer *substantive* rights. The substantive rights it refers to must be sought elsewhere, either in the same instrument or in another one. All a jurisdictional clause can do, is to enable any such rights, whatever they may be (*and if they independently exist*), to be asserted by recourse to the tribunal provided for—this provision being the real purpose of a jurisdictional clause, and all it normally does.<sup>1</sup>

The second principle was that rights under a treaty could be claimed by non-parties only if expressly conferred. Since the Trusteeship Agreement was an arrangement between Britain and the United Nations and the only rights expressly conferred on third States were the national rights provisions of the treaty, it followed that it was not open to the Republic of Cameroon to bring a claim under Article 19 in respect of provisions relating to the general conduct of the Trust. As Fitzmaurice explained,<sup>2</sup> the present case was even clearer than the *South West Africa* cases, because there was no possibility of arguing that the individual Members of the United Nations were parties to the Trusteeship Agreement, nor, since the *Reparation for Injuries* case,<sup>3</sup> could there be any doubt as to the capacity of the United Nations to enter into international agreements.

Finally, Fitzmaurice considered a further British argument to the effect that even if the Respondent's broad view of Article 19 was correct, the present dispute fell outside its terms because it related to the termination of the Trust, not to its performance. This argument Fitzmaurice rejected, chiefly because the eventual termination of the Trust was inherent in its aims and steps towards that end must consequently be regarded as part of the conduct of the Trust.

#### (d) *The meaning of 'negotiation'*

It is rare for a State to initiate international litigation without first attempting to achieve a negotiated settlement. To avoid the possibility, however, it is common to include in adjudication clauses a provision limiting the jurisdiction of the tribunal concerned to disputes incapable of settlement by negotiation, thereby enabling a State to raise an objection to the jurisdiction if in its view prior negotiation has been insufficient.

<sup>1</sup> *I.C.J. Reports*, 1963, p. 115 (original emphasis).

<sup>2</sup> *Ibid.*, pp. 116–17.

<sup>3</sup> *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, *I.C.J. Reports*, 1949, p. 174.



In two of his individual opinions Fitzmaurice considered the content of the obligation to negotiate as a condition of jurisdiction, and in particular the question how far, if at all, the debating of an issue in an international organization can be regarded as equivalent to traditional diplomacy.

In the *South West Africa* cases South Africa's fourth preliminary objection was that the dispute, if there was one, between itself and the Applicants fell outside Article 7 of the Mandate because they had failed to show that the dispute was one which could not be settled by negotiation. The Court rejected the objection on the ground that extensive discussions in the United Nations on the question of South West Africa, in which South Africa and the Applicants had been involved, constituted negotiations in respect of the dispute and the fact that those discussions had ended in deadlock indicated that the dispute could not be settled by negotiation.

In their joint dissenting opinion Spender and Fitzmaurice disagreed. In their view what had occurred in the United Nations did not amount to negotiation within Article 7. Those discussions, they argued, failed to satisfy Article 7 because such discussions had not been directed to the alleged dispute between the Applicants and South Africa, merely to points of disagreement between the Assembly and South Africa. Even if this had not been so, proceedings within an international organization could never be regarded as a substitute for direct negotiations between the parties:

... a 'negotiation' confined to the floor of an international Assembly, consisting of allegations of Members, resolutions of the Assembly and actions taken by the Assembly pursuant thereto, denial of allegations, refusal to comply with resolutions or to respond to action taken thereunder, cannot be enough to justify the Court in holding that the dispute 'cannot' be settled by negotiation, when no direct diplomatic interchanges have ever taken place between the parties, and therefore no attempt at settlement has been made at the statal and diplomatic level.<sup>1</sup>

In his separate opinion in the *Northern Cameroons* case Fitzmaurice examined a very similar issue. Article 19 of the Trusteeship Agreement for the Cameroons, like Article 7 of the Mandate, covered only disputes incapable of settlement by negotiation. The Court, which decided the case on other grounds, did not discuss this aspect of Article 19. Fitzmaurice, however, examining the requirement in the light of his opinion in the *South West Africa* cases, observed that 'negotiation' did not mean, 'a couple of States arguing with each other across the floor of an international assembly, or circulating statements of their complaints or contentions to its member States. That is disputation, not negotiation . . .'<sup>2</sup> and repeated his view that direct negotiations were essential. Finding that the only 'negotiations' in the present case had taken the form of proceedings in the General Assembly, Fitzmaurice upheld a British objection that the requirements of Article 19 had not been satisfied.

Again it is clear that the issue with which Fitzmaurice was concerned in these cases is one that is likely to recur. International organizations provide an in-

<sup>1</sup> *I.C.J. Reports*, 1962, p. 562.

<sup>2</sup> *I.C.J. Reports*, 1963, p. 123.



creasingly attractive forum for the airing of certain types of international dispute. How far this should be regarded as a substitute for direct diplomacy largely depends on one's view of the significance of political institutions in general. Not everyone will agree with Fitzmaurice's uncompromising answer, but there can be no doubt that over a widening area the issue is one which international judicial institutions will have to resolve as part of the larger process of determining their relationship with their political counterparts.

(e) *Other aspects of the Court's jurisdiction*

In the *Northern Cameroons* case an unusual point arose concerning the temporal scope of the Court's jurisdiction. The Republic of Cameroon argued that the effect of Article 19 of the Trusteeship Agreement for the Cameroons was to entitle any Member of the United Nations to bring before the Court disputes relating to the British administration of the territory. Furthermore, she argued that since Article 19 did not expressly exclude disputes concerning events preceding the Member's joining the organization, such disputes also fell within the Court's jurisdiction.

In view of its decision on issues to be considered later, the Court found it unnecessary to deal with this second point. In his separate opinion, however, Fitzmaurice, who regarded the point as raising an important question of principle, examined it in some detail.

Fitzmaurice argued that the silence of Article 19 left the matter open and no more created a presumption in the Applicant's favour than would the failure of a jurisdictional clause to make reference to the local remedies rule, the rule of nationality of claims, or any other objection to admissibility. In Fitzmaurice's view there were two ways in which the Applicant might have used pre-membership events in her case, as background or support for a claim in respect of post-membership events and as the basis for independent claims. Used in the former way reference to pre-membership events would have been unexceptionable. It was clear, however, that the Applicant's intention had not been to use pre-membership events to support a claim in respect of post-membership events, but as the basis for independent claims. In this form and to this extent the application, even if admissible on other grounds, would have been inadmissible *ratione temporis*. This was because of the general principle that to have rights in international law a State must first exist:

... since the Applicant State did not exist as such at the date of these acts and events, these could not have constituted, in relation to it, an international wrong, nor have caused it an international injury. An act which did not, in relation to the party complaining of it, constitute a wrong at the time it took place, obviously cannot *ex post facto* become one. Similarly such acts or events could not in themselves have constituted, or retroactively have become, violations of the Trust, *in relation to the Applicant State*, since the Trust confers rights only on members of the United Nations, and the Applicant State was not then one, nor even, over most of the relevant period in existence as a State and separate international *persona*.<sup>1</sup>

<sup>1</sup> Ibid., p. 129.

The retroactive presumption applied when construing declarations under the Optional Clause was, in Fitzmaurice's view, irrelevant because such a declaration did no more than bring within the scope of the Court's jurisdiction rights and duties acquired by the States concerned in the past. A claim would be inadmissible if brought in respect of a period before a State existed, whatever the basis of jurisdiction relied on and however it might be worded, for the simple reason that to be subject to international law a State first had to exist.

In the *Fisheries Jurisdiction* cases the applicant States sought to found the Court's jurisdiction on Exchanges of Notes in 1961 under which it had been agreed that disputes relating to the extension of fisheries jurisdiction around Iceland could be referred to the Court at the request of either party. Although Iceland refused to appear and took no part in the proceedings, the Court in accordance with Article 53 (2) of the Statute examined the jurisdictional position before considering the merits. In finding by a majority of fourteen to one that the relevant clause in the Exchange of Notes sufficed to give the Court jurisdiction, it considered and rejected a number of objections which Iceland, had she appeared, might have raised.

In his separate opinion Fitzmaurice expressed his complete agreement, then examined in somewhat greater detail a number of the issues dealt with in the judgment. The theme of his opinion was that the significance of the Exchange of Notes, and the compromissory clause in particular, could be understood only by seeing the agreement against its historical background. Pointing out that when the agreement was negotiated fishing zones on the high seas were lawful only in so far as they rested on international agreement, Fitzmaurice explained that the Exchange of Notes conceded such a zone to Iceland only in return for an assurance that further extensions would be subject to judicial review. The present proceedings were precisely the review contemplated by the agreement. It was therefore impossible to accept either that the increasing number of claims to exclusive fisheries in the period after 1961 had any bearing on the jurisdictional position, or that the clause had served its purpose.

Explaining that on the second point the Court had recently rejected similar arguments in the *Jurisdiction of the I.C.A.O. Council* case,<sup>1</sup> Fitzmaurice emphasized that the status of a jurisdictional clause was always ultimately a matter for the Court:

It is always legitimate to seek to maintain (whether correctly or not) that a jurisdictional clause is, *according to its own terms*, inapplicable to the dispute, or has lapsed—and in that event it is for the tribunal concerned to decide the matter, in the exercise of the admitted right or function of the *compétence de la compétence*—(in the case of the Court, in the application of Art. 36, para. 6 of the Statute). But this must equally be so where the alleged cause of inapplicability or inoperativeness of the jurisdictional clause lies not in that clause itself but in the language of, or in considerations pertaining to, the instrument containing it—for otherwise there would be no way of testing (in so far as it affected the jurisdictional clause) the validity of the grounds of

<sup>1</sup> *Appeal relating to the Jurisdiction of the I.C.A.O. Council*, Judgment, *I.C.J. Reports*, 1972, p. 46.



inapplicability or inoperativeness put forward; and the *compétence de la compétence* would be nullified or would be nullifiable *a priori* . . .<sup>1</sup>

The significance of Fitzmaurice's point here is underlined by the circumstances of the *Fisheries Jurisdiction* cases. The post-war period has been a time of rapid political and economic change in which the burden of even recent commitments can suddenly appear unacceptable. If consent, rather than willingness,<sup>2</sup> is to remain the basis of the International Court's jurisdiction, it is of the utmost importance that the *compétence de la compétence* be maintained and the legal significance of changing circumstances be usually regarded as a matter pertaining only to the merits.

In his separate opinion Fitzmaurice emphasized this point. Dealing with the question of changed circumstances Fitzmaurice endorsed the Court's conclusion that the kinds of changes which Iceland might have pointed to in the techniques and conditions of exploitation might be relevant to the merits, but could have no bearing on the obligation to adjudicate. He added that of course it might be otherwise if the changes in question related to 'the operability of the jurisdictional clause itself'<sup>3</sup> as, for instance, if the Court itself had been changed from a court of law to a tribunal of mixed law and conciliation, so that it was effectively no longer the body the parties originally had in mind.

The duress argument was also rejected. Iceland had obtained benefits under the agreement and might, in circumstances which could easily be envisaged, have wished to invoke the jurisdictional clause herself. In a characteristic remark Fitzmaurice observed that the Court could not concern itself with the merits of the 1961 agreement and with whether Iceland should have been granted her exclusive fishery without the *quid pro quo* of the jurisdictional clause. It is clear that in Fitzmaurice's view any imbalance in the agreement favoured Iceland, but in any event such questions were irrelevant to the Court, whose task was to apply the law. Here this simply meant that in the absence of any evidence of duress or other vitiating factors, the agreement must be applied.

Fitzmaurice's opinion in the *Fisheries Jurisdiction* cases contains no novelties or innovations. Its value, like that of so much of Fitzmaurice's judicial and academic writing, lies in its lucid exposition of basic principles. Here that exposition served both to expose with almost clinical precision the hollowness of the Icelandic position on the jurisdictional issue and to contribute to the general body of international law. Fitzmaurice had discussed the *compétence de la compétence* in one of his earlier studies of the Court,<sup>4</sup> and as a statement of the essence of the principle the passage quoted above could scarcely be bettered. The clear separation of the merits of the 1961 agreement and its legal consequences and the emphasis on the historical background of the agreement as the key to its interpretation are highly characteristic. Both, as we shall see, are recurrent features of Fitzmaurice's approach.

<sup>1</sup> *I.C.J. Reports*, 1973, p. 31.

<sup>2</sup> See Fitzmaurice's elucidation of this important distinction in this *Year Book*, 38 (1962), pp. 38-44.

<sup>3</sup> *I.C.J. Reports*, 1973, p. 31.

<sup>4</sup> See this *Year Book*, 34 (1958), pp. 25-56.



Of all Fitzmaurice's judgments the *Fisheries Jurisdiction* opinion is marked by the least disagreement with the Court's position. Indeed, to speak of disagreement is misleading when the opinion is wholly concerned with developing points made by the Court. However, like a number of his other judgments, the *Fisheries* opinion shows how in Fitzmaurice's hands a limited aim never precluded a real contribution to the Court's jurisprudence.

#### ADMISSIBILITY

##### (a) *Admissibility and jurisdiction*

One of the distinctive features of the International Court is the number of preliminary issues that generally need to be resolved before its cases reach the stage of final decision. Objections to the admissibility of a claim and objections to the Court's jurisdiction each raise important and highly technical issues of this kind. Not infrequently the Court postpones consideration of such objections until it has had the opportunity to hear the parties' arguments on the merits.

In the *Barcelona Traction* case, where two of Spain's preliminary objections were dealt with in this way, Fitzmaurice considered the implications of such a joinder to the merits. After indicating that in the present case the justification for postponing consideration of Spain's objections that local remedies had not been exhausted and that Belgium lacked *locus standi* was that both objections were intimately bound up with the merits, he made the important general point that where a preliminary objection was joined to the merits no inference could be drawn from such joinder that the Court was more or less likely to uphold it. Joinder to the merits was entirely neutral in character and 'A joinder can never be interpreted as foreshadowing a conclusion already half arrived at'.<sup>1</sup>

Even more obviously, Fitzmaurice added, the fact that the Court ultimately upheld a preliminary objection should not be read as indicating any particular view of the merits. These are, of course, familiar points.<sup>2</sup> They do, however, appear to be open to a good deal of misunderstanding which Fitzmaurice's purpose was to remove by a typically forthright statement of principle.

The classification and analysis of preliminary issues raises more difficult questions which had engaged Fitzmaurice's attention even before he became a member of the Court.<sup>3</sup> His first opportunity to consider these matters in a judicial capacity was provided by the *Northern Cameroons* case, where in a concise and lucid separate opinion he examined the distinction between jurisdiction and admissibility, with specific reference to the concept of judicial propriety.

Noting the tendency to blur the line between questions of jurisdiction and questions of admissibility, receivability or examinability, Fitzmaurice suggested that:

... the real distinction and test would seem to be whether or not the objection is based on, or arises from, the jurisdictional clause or clauses under which the jurisdiction of

<sup>1</sup> *I.C.J. Reports*, 1970, p. 112.

<sup>2</sup> See Fitzmaurice's earlier discussion in this *Year Book*, 38 (1962), pp. 78, 79.

<sup>3</sup> See this *Year Book*, 34 (1958), pp. 56-66, 108-17.

the tribunal is said to exist. If so, the objection is basically one of jurisdiction. If it is founded on considerations lying outside the ambit of any jurisdictional clause, and not involving the interpretation or application of such a provision, then it will normally be an objection to the receivability of the claim. . . .<sup>1</sup>

However, in order to determine when objections of either kind should be considered a further distinction must be made between preliminary and pre-preliminary objections. For example, any objections to the Court's exercise of its preliminary, or incidental, jurisdiction to indicate interim measures of protection, or admit counter-claims or third party interventions, would have such a pre-preliminary character. Of the various objections to receivability some had a preliminary and some a pre-preliminary character, depending on whether they must be considered before or after determination of the question of the Court's jurisdiction. Thus pleas of admissibility closely connected with the merits could be resolved only after determination of jurisdiction. The same was true of pleas of admissibility relating to defects capable of being cured, for example the plea of non-exhaustion of local remedies, because 'if the plaintiff State is able to cure the defect, it would obviously be absurd for it to return to the Court, only to find that the latter then declared itself to be incompetent on jurisdictional grounds. Therefore all jurisdictional issues should be disposed of first in such a case.'<sup>2</sup>

On the other hand, the plea that the application did not disclose the existence of a dispute, or that the application invited the Court to exceed its judicial function, or, as in the *Monetary Gold* case,<sup>3</sup> that a necessary party was not before the Court, were all objections which should be considered before the question of jurisdiction. This was true also of the kind of objection in the present case, the British contention that owing to subsequent events the application had lost all *raison d'être*. This was because in such cases:

There would clearly be an element of absurdity in the Court going through all the motions of establishing its jurisdiction, if it considered it must then in any event decline to examine the claim on this ground, however competent it might be to do so.<sup>4</sup>

The pre-preliminary character of considerations of propriety were, in Fitzmaurice's view, the key to reconciling the Court's sensitivity to propriety with its duty to hear cases brought before it:

. . . the dismissal of a claim on what are essentially grounds of propriety and irrespective of competence, can be reconciled with the general rule that if the Court is in fact competent, it must exercise its competence and proceed to the merits unless the claim falls to be rejected for some reason of admissibility arising on its substance; for the issue of propriety is one which, if it arises, will exist irrespective of competence, and will make it unnecessary and undesirable for competence to be gone into, so that there will be no question of the Court deciding that it has jurisdiction but refusing to exercise it.<sup>5</sup>

Fitzmaurice added that the existence of so broad a power was all the more

<sup>1</sup> *I.C.J. Reports*, 1963, pp. 102, 103.

<sup>2</sup> *Ibid.*, p. 105.

<sup>3</sup> *Monetary Gold Removed from Rome in 1943*, Judgment, *I.C.J. Reports*, 1954, p. 19.

<sup>4</sup> *I.C.J. Reports*, 1963, p. 105.

<sup>5</sup> *Ibid.*, p. 106.

necessary when no means of filtering baseless claims was available to the Court. To cure this defect it was essential to assume the right to reject claims on grounds of propriety as one of the inherent powers of the Court as an international tribunal.

(b) *Propriety*

In three of his individual opinions Fitzmaurice dealt with the substantive aspects of judicial propriety, that is, the power of the Court to decline to adjudicate on the ground that to do so might in some way violate the Court's duty to act as a judicial institution.

In the *Northern Cameroons* case, as we have just seen, Fitzmaurice began by describing the pre-preliminary character of objections on the grounds of propriety. He then turned to the question of how far the British objection on this ground could be upheld on the facts of the case.

The case had arisen because the Republic of Cameroon disputed the manner in which the United Kingdom had carried out the Trusteeship Agreement relating to the territory of the Cameroons. In particular, the Applicant challenged the British handling of a plebiscite in the Northern Cameroons by which a majority of the populace had elected to join Nigeria, rather than the Republic of Cameroon. The case was distinguished by two unusual features. First, the Applicant sought from the Court no more than a declaration that her case was well founded; there was no claim for damages, or any similar remedy. Secondly, it was clear that the Trusteeship Agreement had been terminated by the United Nations General Assembly and that consequently no decision by the Court could affect the current legal rights of any of the States concerned. A combination of these two features of the case led the Court to reject the application on grounds of judicial propriety. Whilst expressing his agreement with this conclusion, Fitzmaurice examined the point in issue in further detail.

In her pleadings the Applicant had sought to demonstrate that what she sought from the Court was merely a declaratory judgment and had cited as support for her argument several cases in which such judgments had been given by international tribunals. The Applicant's argument on this point was upheld by Judge Badawi in his dissenting opinion.<sup>1</sup> But Fitzmaurice, who clearly regarded the issue as going to the root of the Court's function, did not agree.

Explaining that there was nothing unusual in the Court's being asked for a declaratory judgment in respect of a current treaty, nor in a request for compensation for breach of a treaty which was no longer current, Fitzmaurice saw the combination of a request for a declaratory judgment in respect of a defunct treaty as presenting an academic question which it would be improper for the Court to answer. In words which may come to be regarded as definitive on issues of propriety he said:

. . . courts of law are not there to make legal pronouncements *in abstracto*, however great their scientific value as such. They are there to protect existing and current legal rights, to secure compliance with existing and current legal obligations, to afford

<sup>1</sup> *I.C.J. Reports*, 1963, pp. 150-3.



concrete reparation if a wrong has been committed, or to give rulings in relation to existing and continuing legal situations. Any legal pronouncements that emerge are necessarily in the course, and for the purpose, of doing one or more of these things. Otherwise they serve no purpose falling within or engaging the proper function of courts of law as a judicial institution.<sup>1</sup>

Fitzmaurice emphasized that the question was not whether a decision from the Court would have *any* consequences:

Evidently a judgment of the Court, even if not capable of effective *legal* application, could have other uses. It could afford a moral satisfaction. It could act as an assurance to the public opinion of one or other of the parties that something had been done or at least attempted. There might also be political uses to which it could be put. Are these objects of a kind which a judgment of the Court ought to serve? The answer must, I think, be in the negative, if they are the only objects which would be served—that is, if the judgment neither would nor could have any effective sphere of legal application.<sup>2</sup>

To the argument that a judgment might have legal consequences because it might be made the basis of further proceedings, Fitzmaurice pointed out that any such possibility was highly speculative and would require British consent. Moreover, it had been clear since 1950<sup>3</sup> that any judgment given on the merits of the present case could not subsequently be extended by seeking an interpretation of the judgment from the Court.

Fitzmaurice supported his conclusion on the question of propriety by pointing out that had the Court proceeded to the merits, a decision in favour of the Applicant would have failed to establish any causal link between the alleged breaches of the Trusteeship Agreement and the loss the Applicant claimed to have suffered. It was doubtful on the facts whether any such link could ever have been established and it would certainly be wrong for the Court to give a decision when no attempt had been made to prove that one existed.

It is not the task of an international tribunal to apportion blame *in vacuo*, or to find States guilty of illegalities except as a function of, and relative to a decision that these have been the cause of the consequences complained of, for which the State concerned is accordingly internationally responsible; or except in relation to a still continuing legal situation in which a pronouncement that illegalities have occurred may be legally material and relevant.<sup>4</sup>

In the history of both the present Court and its predecessor the issue of propriety has most frequently arisen in cases concerning the Court's advisory jurisdiction. In his dissenting opinion in the *Namibia* case Fitzmaurice examined two aspects of propriety with a particular bearing on the scope of that jurisdiction.

By resolution 2145 (XXI) the United Nations General Assembly purported to terminate the Mandate for South West Africa held by South Africa. Subsequently the Security Council adopted resolution 276 (1970) declaring that the

<sup>1</sup> Ibid., pp. 98, 99.

<sup>2</sup> Ibid., p. 107 (original emphasis).

<sup>3</sup> See the *Request for Interpretation of the Judgment of 20th November 1950 in the Asylum Case*, Judgment, *I.C.J. Reports*, 1950, p. 395.

<sup>4</sup> *I.C.J. Reports*, 1963, p. 100.

continued presence of South Africa in Namibia was illegal and calling upon States to act accordingly. The Security Council then asked the Court for an advisory opinion on the question: 'What are the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970)?'

Read literally the request appeared to require the Court to assume the validity of the resolutions on which it was based and to confine its opinion to the consequences for States of resolution 276. Without really saying why it was doing so, the Court interpreted its task more broadly and examined the validity of resolution 2145. Fitzmaurice considered that this approach was essentially correct, but that a fuller explanation was required because the case raised the fundamental issue of propriety. In Fitzmaurice's view the termination of the Mandate was the pivot of the case. It was essential for the Court to examine the validity of that termination because if the Mandate was still in existence either the question asked in the request did not arise, or any answer to it would be purely hypothetical. In either case for the Court to proceed would be incompatible with its judicial function. If the General Assembly or Security Council chose to refer a question to a body of legal experts and required them to make certain assumptions as to the legal position, they would be bound to obey their instructions:

But the Court, which is itself one of the six original main organs of the United Nations, and not inferior in status to the others, is not bound to take instruction from any of them, in particular as to how it is to view and interpret its tasks as a court of law, which it is and must always remain, whatever the nature and context of the task concerned:—and whereas a body of experts may well, as a sort of technical exercise, give answers on the basis of certain underlying assumptions irrespective of their validity or otherwise, a court cannot act in this way: it is bound to look carefully at what it is being asked to do, and to consider whether the doing of it would be compatible with its status and function as a court.<sup>1</sup>

In relation to the advisory jurisdiction this very clear statement of the relationship between the Court and other United Nations organs shows how in Fitzmaurice's view the concept of propriety safeguards the Court's integrity and independence. On the scope of that concept the passage echoes the views Fitzmaurice expressed in the *Northern Cameroons* case, and it is not difficult to see why he considered that to proceed on the basis of an unexamined hypothesis would be as improper as to disinter a dead issue:

For a court to give answers that *can only* have significance and relevance if a certain legal situation is presumed to exist, but without enquiring whether it does (in law) exist, amounts to no more than indulging in an interesting parlour game, which is not what courts of law are for.<sup>2</sup>

Another facet of propriety was raised by the political nature of the request. The argument that the Court should decline to give advisory opinions in politically contentious circumstances was frequently raised in a number of early cases concerning the interpretation of the Charter. It was an argument that the

<sup>1</sup> *I.C.J. Reports*, 1971, p. 303.

<sup>2</sup> *Ibid.*



Court never accepted, preferring to regard these as questions of treaty interpretation, the political circumstances of which were not the Court's concern. The highly political background of the *Namibia* case prompted Fitzmaurice to reconsider the issue. After outlining the reasons for believing that the present case was an attempt to use the Court for a political end, namely the creation of the new State of Namibia, Fitzmaurice reiterated the generally accepted view that political circumstances could be disregarded so long as the questions put to the Court were intrinsically legal. In the present case the implication that the Court should assume that the Mandate had been validly terminated gave a 'political twist'<sup>1</sup> to the request, but given that both the termination of the Mandate and the consequences for States were legal questions, Fitzmaurice held that it would not be improper for the Court to comply with the request.

Nine years before the *Namibia* case Fitzmaurice had examined the 'political' aspect of judicial propriety in other proceedings over South West Africa. In the 1962 *South West Africa* cases, the Applicants, Ethiopia and Liberia, challenged the performance by South Africa of her obligations under Article 2 of the Mandate for South West Africa. In their joint dissenting opinions Judges Spender and Fitzmaurice suggested that the nature of this issue raised a question of judicial propriety. Noting that under Article 2 the Mandatory was obliged to 'promote to its utmost the material and moral well-being and the social progress of the inhabitants of the territory . . .'. Spender and Fitzmaurice observed:

There is hardly a word in this sentence which has not now become loaded with a variety of overtones and associations. There is hardly a term which would not require prior objective definition, or redefinition, before it could justifiably be applied to the determination of a concrete legal issue. There is hardly a term which could not be applied in widely different ways to the same situation or set of facts, according to differing subjective views as to what it meant, or ought to mean in the context; and it is a foregone conclusion that, in the absence of objective criteria, a large element of subjectivity must enter into any attempt to apply these terms to the facts of a given case. They involve questions of appreciation rather than of objective determination. As at present advised we have serious misgivings as to the legal basis on which the necessary objective criteria can be founded.<sup>2</sup>

The appropriate forum for resolving such issues was, they suggested, a technical or political body such as the Trusteeship Council or the General Assembly, rather than an international court, and the fact that no such body was available in the present case had no bearing on the propriety issue as they saw it.

As has been seen, Spender and Fitzmaurice based their dissent on other grounds which their brief discussion of propriety was intended only to reinforce. At no stage, indeed, was propriety a prominent issue in the *South West Africa* cases. Perhaps it ought to have been. Municipal courts apply standards as vague as those of Article 2 of the Mandate every day, but can usually buttress their decision by referring to the actual or assumed values of the community of which they are a part. Because there are so few truly universal values in the international

<sup>1</sup> Ibid., p. 308 n. 9.

<sup>2</sup> *I.C.J. Reports*, 1962, pp. 466-7.



community an international court has no corresponding assistance. International Courts can, of course, help to form such values by their decisions. But this will always be difficult in cases which raise issues on which States are deeply divided and it is at least arguable that, as the Spender/Fitzmaurice opinion strongly implied, international justice is best served when the attention of international courts can be focused on relatively technical issues.

(c) *The concept of a dispute*

The objection that an application does not disclose the existence of a dispute is usually an objection to the jurisdiction of the court or to the admissibility of a claim. If the instrument relied upon by the applicant as the basis of the Court's jurisdiction explicitly limits the court to dealing with disputes, the objection will be an objection to the jurisdiction. If, on the other hand, the instrument is silent, the objection will relate to admissibility because under the Statute only disputes may be referred to the Court.

In three of his individual opinions Fitzmaurice examined the concept of a dispute. In the *Northern Cameroons* case and the *South West Africa* cases, the issue arose as one of jurisdiction. In the *Namibia* case neither jurisdiction nor admissibility was in issue and Fitzmaurice's discussion concerned the existence of a dispute for the purposes of appointing a judge *ad hoc*.

In the *Northern Cameroons* case the Republic of Cameroon sought to found the jurisdiction of the Court on Article 19 of the Trusteeship Agreement for the Cameroons which provided that:

If any dispute whatever should arise between the Administering Authority and another member of the United Nations relating to the interpretation or application of the provisions of this Agreement, such dispute, if it cannot be settled by negotiation or other means, shall be submitted to the International Court of Justice provided for in Chapter XIV of the United Nations Charter.

In its first preliminary objection the United Kingdom denied that there was any dispute between itself and the Applicant capable of activating this provision. Whilst upholding the British case on other grounds, the Court briefly dismissed this objection, holding that the parties' opposing views on the interpretation and application of the Trusteeship Agreement revealed the existence of a dispute in the sense recognized by the previous jurisprudence of the Court.

In his separate opinion Fitzmaurice questioned this conclusion and, taking as his starting-point some uncontroversial elements in the dispute concept, developed these ideas in an unusual direction. He began by pointing out that although in this case the issue arose as a question of jurisdiction because of the wording of Article 19, the existence of a dispute was always a precondition of the Court's exercising its powers, since these powers were necessarily confined to dealing with legal disputes. Moreover, it was generally agreed that:

... if there is a dispute, it must have existed before, and at the date of, the Application to the Court, and that the Application does not suffice *per se* to create a dispute. It is also accepted that the mere assertion or denial of a dispute is not sufficient in itself

either to establish or to refute its existence; and further that a dispute must involve something more than a mere difference of opinion.<sup>1</sup>

To identify that 'something more' Fitzmaurice adopted the view expressed by Judge Morelli in an earlier case that the minimum required to establish the existence of a legal dispute was that:

. . . the one party should be making, or should have made, a complaint, claim, or protest about an act, omission or course of conduct, present or past, of the other party, which the latter refutes, rejects, or denies the validity of, either expressly, or else implicitly by persisting in the acts, omissions or conduct complained of, or by failing to take the action, or make the reparation demanded.<sup>2</sup>

To this, however, Fitzmaurice added a further requirement in order, as he put it, to distinguish a dispute from 'a mere divergence of view about matters of theoretical, scientific or academic interest'.<sup>3</sup> His final view was that:

. . . there exists, properly speaking, a legal dispute (such as a court of law can take account of, and which will engage its judicial function), only if its outcome or result, *in the form of a decision of the Court*, is capable of affecting the *legal* interests or relations of the parties, in the sense of conferring or imposing upon (or confirming for) one or other of them, a legal right or obligation, or of operating as an injunction or a prohibition for the future, or as a ruling material to a still subsisting legal obligation.<sup>4</sup>

In view of his findings on the issue of propriety, it is not surprising that Fitzmaurice found that the Applicant's differences with the United Kingdom over the Trusteeship Agreement fell outside the above definition, with the result that there was in his view no dispute between two States to which Article 19 could apply.

In the 1962 *South West Africa* cases the relevant part of Article 7 of the Mandate, on which the Applicants sought to found the Court's jurisdiction, provided that:

The Mandatory agrees that, if any dispute whatever should arise between the Mandatory and another Member of the League of Nations relating to the . . . Mandate, such dispute . . . shall be submitted to the Permanent Court of International Justice. . . .

In her third preliminary objection South Africa denied that there was any dispute between herself and the Applicants, so as to entitle the Court to take jurisdiction on the basis of Article 7.

In his joint dissenting opinion Fitzmaurice endorsed this conclusion and discussed the concept of a 'dispute' in international law in the light of the facts of the present cases. In the view of Spender and Fitzmaurice the real dispute was between South Africa and the United Nations because the Applicants, Ethiopia and Liberia, were acting in a representational capacity only. But this was far from sufficient to activate Article 7 because the dissenters did not consider

that a dispute which has been conducted by a State (if 'conducted' is the proper term

<sup>1</sup> *I.C.J. Reports*, 1963, p. 109.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*, p. 110.

<sup>4</sup> *Ibid.* (original emphasis).



at all) solely within the framework of an international organization, in its capacity as a member of that organization, and by simple participation in its activities, without the dispute ever having been taken up directly with the defendant State outside the organization, can constitute a dispute between States of the kind envisaged by the normal adjudication clause.<sup>1</sup>

The views of Fitzmaurice and Spender in the *South West Africa* cases provide an interesting contrast to Fitzmaurice's own discussion of the concept of a dispute in the *Namibia* case. The dispute question was not an issue in that case, but in the annex to his dissenting opinion Fitzmaurice explained his earlier disagreement with the Court's Order of 29 January 1971 refusing a South African application to appoint a judge *ad hoc*. The disagreement turned in part on the meaning of the term 'dispute'. Article 31 of the Court's Rules states that if an advisory opinion 'is requested upon a legal question actually pending between two or more States, Article 31 of the Statute shall apply . . .'. In Fitzmaurice's view Rule 83 clearly applied to the *Namibia* proceedings because 'it is evident that there is a whole series of legal questions in issue (or in dispute) between South Africa on the one hand and a number of other States, and that these questions are, in this sense, outstanding and unresolved, inasmuch as the view held on one side as to their correct solution differs *in toto* from that taken on the other'.<sup>2</sup>

Although, as Fitzmaurice noted, this view of what constitutes a dispute corresponds to the view he took of this issue in the *Northern Cameroons* case, there may at first sight appear to be some difficulty in reconciling it with his 1962 view that South Africa's South West Africa dispute was with the United Nations and not with individual members. One way of avoiding this problem would have been to hold that a dispute for jurisdictional purposes might not be the same thing as a dispute for the purposes of Rule 83. In view of the very different functions performed by the concept in the two contexts a cogent case might be made out for a distinction along these lines. Fitzmaurice, however, adopted a different approach and held that the view that in the *Namibia* case the only dispute was between South Africa and the United Nations could not be maintained when the purported termination of the Mandate by the General Assembly was intended to be the basis of individual action taken by States outside the organization in their relations with South Africa, for example the initiation by a number of States of a challenge to South Africa's right to extend the 1965 Montreux International Telecommunication Convention to South West Africa.

Collectively these three individual opinions are a useful elucidation of several aspects of a difficult concept. One may perhaps question whether the virtually complete identification of the dispute issue with the question of propriety in the *Northern Cameroons* case was really necessary. But the less controversial section of the opinion, though breaking no new ground, is a typically clear and economical restatement of accepted views. The *South West Africa* opinion raises the crucial question of how far disputes arising in, and conducted through, international organizations should be assimilated to traditional international

<sup>1</sup> *I.C.J. Reports*, 1962, p. 549.

<sup>2</sup> *I.C.J. Reports*, 1971, p. 313.



disputes for jurisdictional purposes. Whether or not the broad view of this question taken by the majority in that case will ever be applied outside the South West Africa situation, many will find Fitzmaurice's narrower approach more persuasive. It does not seem unreasonable to treat traditional diplomacy as a precondition of international adjudication, provided that, as Fitzmaurice persuasively argued in the *Namibia* case, the extra-mural consequences of an institutional disagreement can in appropriate circumstances also be regarded as relevant.

(d) *Nationality of claims*

The only occasion on which Fitzmaurice dealt with this principle was in his separate opinion in the *Barcelona Traction* case. The scope of the principle was the main issue in that case because the question before the Court was how far, when injury had been suffered by a foreign company, shareholders of a different foreign nationality who suffered consequential injury could be diplomatically protected by their national State. Spain, the respondent State, in her third preliminary objection denied that protection could be exercised in these circumstances and argued that diplomatic protection was the prerogative of the national State of the injured company. The Court upheld this objection and decided that, subject to exceptions of no relevance, only Canada, as the national State of the company, and not Belgium, the national State of the shareholders, would have been competent to institute proceedings.

In his separate opinion Fitzmaurice expressed his reluctant agreement with this conclusion. *De lege ferenda*, however, he considered that Belgium should have had a right to exercise diplomatic protection in the present case.

In Fitzmaurice's view it would be more satisfactory if the shareholders' State acquired the right to exercise diplomatic protection whenever the national State of the company refused to do so and the reasons for that refusal had nothing to do with the interests of the company. There would, in his view, be no objection in principle to granting the *prima facie* right to exercise protection to the national State of the company, while regarding the national State of the shareholders as possessing a subordinate right. That subordinate right, in Fitzmaurice's view, would correspond to the shareholders' rights in municipal law to take action against the management of a company or, in appropriate circumstances, against third parties.<sup>1</sup>

One of the points left open by the Court was what the position would have been had the *Barcelona Traction* company been incorporated in Spain instead of in Canada. The local incorporation of foreign-owned companies either voluntarily, or as a condition of operation in the host State, is, of course, very common, and as part of his discussion of the relevance of the nationality of claims rule to corporations Fitzmaurice gave some attention to the point.

In Fitzmaurice's view, where a company had the nationality of the host State, the national State of the shareholders would be entitled to exercise diplomatic protection in respect of acts by the host State which rendered the

<sup>1</sup> *I.C.J. Reports*, 1970, pp. 76-9.

company incapable of protecting its interests. This followed from the fact that in such a situation the company had been rendered incapable of protecting its own interests and the national State of the company could not exercise diplomatic protection since it was itself the wrongdoer. It had been argued that though this conclusion was correct where local incorporation had been imposed upon a company that was essentially foreign, it did not follow where local incorporation was voluntary. In Fitzmaurice's view this distinction must be rejected and it would not be appropriate for the Court to examine the motives behind local incorporation. Fitzmaurice also considered that even if previously decided cases were not directly in point, diplomatic protection in cases of local incorporation could be sufficiently justified by the considerations of principle already mentioned.<sup>1</sup>

Among the several issues on which Fitzmaurice stated a view, whilst deliberately refraining from making a judicial pronouncement, were a number of questions relating to the nationality of the shareholders in the Barcelona Traction Company. Considering, first, on whom lay the burden of proving the shareholders' nationality, Fitzmaurice observed that whilst in principle the burden always lay on the Applicant, where, as in the present case, it had been assumed throughout by both sides that some shareholders had the Applicant State's nationality, there was an 'almost irresistible inference'<sup>2</sup> that the Applicant had the necessary interest in the case. Though it was true that doubts might surround the extent of the interest, in the sense of the number of shareholders with the Applicant State's nationality, such doubts were relevant to the measurement of any damages due, but not to the validity of the claim.

Much of the complexity of the *Barcelona Traction* case stemmed from the fact that the Applicants based their claim *inter alia* on shares which had been originally held by a Belgian company, Sidro, which was in turn largely owned by another Belgian company, Sofina. Spain argued that the shareholding in Sidro-Sofina was non-Belgian and that as a result Belgium could not claim to exercise diplomatic protection on its behalf without abandoning its main argument that the corporate veil of the Barcelona Traction Company could be pierced to establish Belgian *ius standi*. Fitzmaurice lucidly exposed the error in this line of argument. Belgium's claim was to act if Canada did not. In relation to Sidro-Sofina this position simply required Belgium to acknowledge the right of the national State of the shareholders to act if Belgium did not, and this Belgium obviously could acknowledge without weakening her own claim in any way.

A second difficulty was that Sidro-Sofina had vested many of its Barcelona Traction shares in American nominees and an American trustee company. Spain argued that as a result, when the Belgian claim arose in 1948 the shareholding in Barcelona Traction was American, not Belgian. Fitzmaurice held that whether the question was who owned the shares, or who the shareholder was, the placing of shares in the hands of nominees was a mechanical device which in the present context had no effect on the original owner's position.

<sup>1</sup> *I.C.J. Reports*, 1970, pp. 72-5.

<sup>2</sup> *Ibid.*, p. 89.

Because the powers of a trustee were much greater than those of a nominee, the result of placing shares in the hands of a trustee would in Fitzmaurice's view usually be to divest the original shareholder. Here, however, two factors pointed to the opposite conclusion. First, the transference to trustees had been an emergency wartime measure and though the trust documents had not been produced, it was a reasonable inference that they contained a clause terminating the trust relationship at the end of the war. Secondly, and more fundamentally, the circumstances of the present case put the trust relationship in the present case into a special category:

It is not in my opinion possible to regard instruments drawn up in emergency circumstances, for the protection of property in contemplation of war, and of a singularly predatory enemy . . . in the same light as instruments entered into at other times and in the ordinary way of business . . . such transactions in shares as those now in question . . . must, on the international plane, be regarded as creating between the parties a relationship of a special character, neither divesting the shares of their pre-existing national character, nor debarring the transferor's government from sustaining a claim in respect of them in subsequent international proceedings. Outside of a medieval disputation, if ever there was a case for having regard to the reality rather than the form, this is surely it.<sup>1</sup>

The so-called continuous nationality rule has been widely interpreted as requiring that a claimant be shown to have the nationality of the State exercising diplomatic protection from the date of infliction of the injury to the date when the claim is brought. By their very nature shareholders' claims will often encounter difficulties with the rule, especially when the time interval is considerable and the shares in question have been extensively traded. In the *Barcelona Traction* case Spain argued that Belgium had failed to show that the shares in question had the requisite national character between the two critical dates 1948 and 1962. Though he was inclined to doubt the accuracy of the Spanish assertion on the facts, Fitzmaurice questioned whether the continuous nationality rule could still be supported. Whilst accepting that a claim must possess the requisite national character when it arose, Fitzmaurice quoted Judge Van Eysinga<sup>2</sup> and a number of British scholars in support of the view that no rule of customary international law required that strict regard to be paid to subsequent changes of nationality. In Fitzmaurice's view:

. . . too rigid and sweeping an application of the rule can lead to situations in which important interests go unprotected, claimants unsupported and injuries unredressed, not on account of anything relating to their merits, but because purely technical considerations bring it about that no State is entitled to act.<sup>3</sup>

In the absence of any compelling justification there was therefore every reason to deny the relevance of the rule to cases like the present one.

<sup>1</sup> Ibid., p. 99.

<sup>2</sup> See his opinion in the *Panevezys-Saldutiskis Railway* case, *P.C.I.J.*, Series A/B, No. 76 (1939), pp. 33-5.

<sup>3</sup> *I.C.J. Reports*, 1970, pp. 101, 102.



*(e) The local remedies rule*

The question whether local remedies had been exhausted was another of the issues in *Barcelona Traction*, the only case in which Fitzmaurice had an opportunity to comment on this condition of admissibility. Fitzmaurice's treatment of the local remedies rule was intended to be an expression of view, rather than a pronouncement or finding, but like his discussion of the nationality of claims rule, already described, this diminishes neither its interest nor its importance.

In Fitzmaurice's view, when an international claim was brought in respect of proceedings in a municipal court, the relevance of the local remedies rule depended on the validity of the proceedings complained of. If such proceedings were *ab initio* valid and the complaint was, for example, that the result amounted to a denial of justice, then exhaustion of local remedies was a prerequisite of international litigation. If, however, the proceedings were from their inception invalid for some reason, then exhaustion of local remedies was no longer required.<sup>1</sup>

Turning to the facts of the case, Fitzmaurice found that the first ground on which the validity of the proceedings against *Barcelona Traction* had been disputed was that by declaring the Canadian company bankrupt the Spanish Courts had exceeded their jurisdiction. Fitzmaurice's view was that in the unusual circumstances of the case this argument was well founded. In his opinion the key to the case was not the domicile or nationality of the company but the alleged default on which the bankruptcy proceedings were based. The *Barcelona Traction* company had issued sterling bonds in Canada and the bankruptcy petition was based on the alleged non-payment of interest on these bonds. But few Spanish nationals held any of the bonds, which had been issued under Canadian law and were under the jurisdiction of the Canadian National Trust. Canada, rather than Spain, was therefore the appropriate forum for actions relating to the bonds, the more so since by the terms of the relevant trust deeds no bond-holder was entitled to take proceedings without prior reference to the Canadian Trustee. In these circumstances and despite the fluidity of international law on the question of jurisdiction, Fitzmaurice concluded that the initiation of bankruptcy proceedings in Spain, without reference to the primary remedies available in Canada, had clearly exceeded Spanish jurisdiction:

It is true that, under present conditions, international law does not impose hard and fast rules on States delimiting spheres of jurisdiction in such matters . . . but leaves to States a wide discretion. It does, however (a) postulate the *existence* of limits—though in any given case it may be for the tribunal to indicate what these are for the purposes of that case; and (b) involve for every State an obligation to exercise moderation and restraint as to the extent of the jurisdiction assumed by its courts in cases having a foreign element, and to avoid undue encroachment on a jurisdiction more properly appertaining to, or more properly exercisable by, another State.<sup>2</sup>

<sup>1</sup> Lauterpacht had held a similar view, which Fitzmaurice examined in this *Year Book*, 37 (1961), pp. 57, 58.

<sup>2</sup> *I.C.J. Reports*, 1970, p. 105.

It followed that various later stages of the bankruptcy proceedings also exceeded Spanish jurisdiction. Among those specifically mentioned by Fitzmaurice were the purported cancellation of the Company's shareholding in another Canadian Company, Ebro, and the attempted transfer of Ebro's share register, registered offices and seat, all of which were also Canadian, to Spain, a process which Fitzmaurice described as a 'disguised expropriation of the undertaking.'<sup>1</sup>

The second ground for disputing the validity of the Spanish bankruptcy action, and hence the relevance of the local remedies rule, was that the Spanish authorities had failed to provide the Barcelona Traction Company with proper notice of the proceedings. Fitzmaurice considered that this argument too was well founded. Dismissing as irrelevant the question whether the Company had in fact been aware of the action being taken in Spain against it, Fitzmaurice suggested that the real issue was whether the Company had received the notification which it was in law entitled to receive. He acknowledged that civil law systems adopted a creditor-oriented approach to bankruptcy in which the rigorous requirements of notice of impending proceedings demanded by the common law had no place. In international law, however, the circumstances of the Barcelona Traction bankruptcy required that at least some formal notice of the decision be given to the Company in case it wished to challenge it. This was an elementary principle of justice:

. . . at the very least the debtor, having been declared bankrupt, should receive actual notice—judicial notice—of the declaration of bankruptcy and should do so in such a form which must ensure that it is brought directly to the attention of the person or entity concerned. Unless this is done the process, viewed as a whole, comes very near to constituting, if not a species of concealment, at least a serious obstacle to the possibility of a timely challenge to the bankruptcy; so that a procedure already highly favourable to the creditor interest, becomes loaded against that of the debtor to an extent difficult to reconcile with the standards of the administration of justice required by international law.<sup>2</sup>

This argument was reinforced by the foreign elements in the case, which made publication of the decision in the local press a totally inadequate form of notice. In Fitzmaurice's view the decision should have been brought to the Company's attention by publishing it in Toronto, or, preferably, by notifying the Company directly. Failure to provide notification of this kind, like the excess of jurisdiction which the proceedings involved, rendered the proceedings void *ab initio* in international law, and in Fitzmaurice's view thereby relieved the Company of any obligation to exhaust local remedies.

Fitzmaurice's separate opinion in *Barcelona Traction* is perhaps the clearest example of his ability to cut through the complexities of a case in order to identify the crucial issues. Though eight other individual opinions were delivered and each discussed at length one or more aspects of the case, Fitzmaurice's wide-ranging discussion of the main nationality of claims issue and the

<sup>1</sup> Ibid., p. 106.

<sup>2</sup> Ibid., p. 108.

subordinate issue of exhaustion of local remedies can fairly be said to provide the clearest and most balanced analysis of this demanding case.

### PARTICULAR QUESTIONS OF INTERNATIONAL LAW

In his separate opinion at the second stage of the *Temple* case Fitzmaurice examined several aspects of international law relating to boundary settlements, as well as a number of more general issues.

The case arose out of a treaty dating from 1904 under which Cambodia (represented by France) and Thailand agreed that their common frontier lay along the watershed of two river basins and decided to set up a Mixed Commission to delineate the boundary. On the map which was eventually produced, the boundary failed to conform to the watershed and, as a result, the Temple of Preah Vihear was wrongly placed on the Cambodian side of the frontier. After Thailand had stationed troops in the disputed area, Cambodia brought the matter before the Court, which in its judgment rejected the attempt to impugn the settlement and based its decision in favour of Cambodia on Thailand's acceptance of the erroneous line.

Fitzmaurice expressed his full agreement with this decision and devoted his separate opinion to an elaboration of the points relied on in the judgment and some additional matters. The disputed treaty settlement had, of course, virtually removed from the case the question of acquisition of title to territory in general international law. Fitzmaurice's discussion of this issue was therefore confined to a reiteration of the familiar principle that where the maintenance of sovereignty is concerned:

... especially in wild or remote regions comparatively few acts are necessary for that purpose where the title does not primarily depend on the character or number of those acts themselves, but derives from a known and independent source, such as a treaty settlement.<sup>1</sup>

On the vital question of Thailand's acceptance of the disputed boundary Fitzmaurice stressed the heavy burden of proof that lay on Cambodia: '... acceptance by conduct alone, of an obligation in the nature of a treaty obligation, is not lightly to be presumed; especially where a frontier is in question; and even more so where the frontier line thus said to be accepted involves a departure from the delimitary criterion indicated by the relevant treaty.'<sup>2</sup> His decision, however, was that Thailand's conduct could be interpreted in no other way, in view of the fact that '... even negative conduct—that is failure to act, react or speak, in circumstances where failure to do so must imply acquiescence or acceptance—is ... quite sufficient for this purpose, if the facts are clear'.<sup>3</sup> In so deciding, Fitzmaurice rejected Thailand's argument that acceptance of the line would be a departure from the treaty, on the ground that 'it is always open to Governments in their bilateral relations, to agree on a departure of this kind, provided they do so knowingly, or ... in circumstances in which they must be

<sup>1</sup> *I.C.J. Reports*, 1962, p. 64.

<sup>2</sup> *Ibid.*, p. 55.

<sup>3</sup> *Ibid.*



held to have accepted, and as it were discounted in advance, the risks or consequences of lack, or possible lack of knowledge.’<sup>1</sup>

In Fitzmaurice’s view Thailand’s plea of error also demanded a cautious approach ‘. . . in the interests of the stability of treaties, and of frontier lines established by treaty or other forms of agreement’.<sup>2</sup> The fact that an error had been made was not, Fitzmaurice suggested, enough. The question was whether, if Thailand’s acceptance of the frontier had been based on the belief that it conformed to the watershed, the error in the delimitation was relevant legally. Fitzmaurice gave two reasons for holding that it was not. In the first place the Applicant had been content to leave the delimitation to the French Government and must therefore be bound by the result:

One may sympathise with Siam’s lack of topographical and cartographical expertise at this time, but one is dealing with sovereign independent States to whom certain rules of law apply; and it remains the fact that in the absence of any question of lack of good faith, the legal effect of reliance on the skill of an expert is that one must abide by the results—in short, a principle akin to that of *caveat emptor* is relevant.<sup>3</sup>

Secondly, it was clear that Thailand’s reliance on error was inconsistent with her attempt to demonstrate that her acts of administration in the disputed area showed that she had never accepted the boundary. On this point Fitzmaurice agreed with the Court that little weight could be attached to the behaviour of provincial officials in so remote an area in the period immediately following the boundary settlement.

Another issue was the weight to be attached to treaties of 1925 and 1937 under which Thailand and Cambodia had confirmed their existing frontiers. Cambodia had argued that these had the effect of validating the erroneous boundary, but Fitzmaurice disagreed, holding that the later treaties could not be regarded as giving the disputed line an independent basis, but simply confirmed the proper boundary, whatever it might be. He agreed, however, that the treaties could be used as evidence of the importance the parties attached to settling the frontier by their earlier agreement. Here Fitzmaurice relied on the important evidential principle that

. . . a party’s attitude, state of mind or intentions at a later date can be regarded as good evidence—in relation to the same or a closely related matter—of his attitude, state of mind, or intentions at an earlier date also; provided of course that there is no direct evidence rebutting the presumption thus raised. Similarly—and very important in cases affecting territorial sovereignty—the existence of a fact, or of a situation, at a later date, may furnish good presumptive evidence of its existence at an earlier date also, even where the later situation or state of affairs has in other respects to be excluded from consideration.<sup>4</sup>

Perhaps the most significant issue raised by the case was the question of estoppel, an important, but relatively undeveloped, aspect of international law. The fundamental issue of legal policy in the *Temple* case was whether a frontier, apparently settled by the parties in the distant past, could now be amended as

<sup>1</sup> Ibid., p. 56.

<sup>2</sup> Ibid., p. 57.

<sup>3</sup> Ibid., p. 58.

<sup>4</sup> Ibid., p. 62.

a result of judicial investigation of evidence impugning the settlement. The question is one which occurs frequently in territorial disputes and the answer often depends on the view taken of the scope of the doctrine of estoppel.<sup>1</sup> In the *Temple* case a number of views were expressed. In his dissenting opinion Sir Percy Spender adopted a strict view of the doctrine, demanding unequivocal acts from the State against whom the estoppel is invoked and clear evidence of reliance by the other party.<sup>2</sup> A much broader view is to be found in the extended discussion in Judge Alfaro's separate opinion, where the inconsistent behaviour of the State estopped was conceived as the basis of the doctrine.<sup>3</sup> The Court's treatment of the issue was very brief and confined to the facts of the case. Fitzmaurice on the other hand, like his two colleagues, dealt with the question at greater length and discussed the general principle.

Fitzmaurice's abhorrence of loose terminology and blurred conceptual boundaries has been noted earlier, and this analysis of estoppel is a further illustration. He began by distinguishing between cases of estoppel, properly so-called, and cases where, though the language of estoppel might be used, no true estoppel could be said to exist. The key to this distinction was, in his view, the existence of an obligation independent of the alleged estoppel. Where such an obligation existed, and a denial of its existence could be shown to be false, the plea of estoppel was inappropriate. For that concept was required only in situations where the denial of any obligation might be true:

Such a plea is essentially a means of excluding a denial that might be *correct*—irrespective of its correctness. It prevents the assertion of what might in fact be *true*. Its use must in consequence be subject to certain limitations. The real field of operation, therefore, of the rule of preclusion or estoppel, *stricto sensu*, in the present context, is where it is possible that the party concerned did not give the undertaking or accept the obligation in question (or there is room for doubt whether it did), but where that party's subsequent conduct has been such, and has had such consequences, that it cannot be allowed to deny the existence of an undertaking, or that it is bound.<sup>4</sup>

As Fitzmaurice explained, this distinction was particularly important in relation to acquiescence because, depending on the circumstances, this could either generate a true estoppel, so preventing the assertion of the original obligation, or change that obligation by the process of tacit agreement which had occurred in the present case.

Turning to the conditions under which a true estoppel could arise Fitzmaurice identified the basic requirement as a change in the parties' relative positions, stemming from the behaviour of the party against whom the estoppel was alleged. In Fitzmaurice's view this relative change of position underlay the notions of 'reliance', 'holding out', and 'detriment' commonly associated with the concept:

The essential condition of the operation of the rule of preclusion or estoppel, as strictly to be understood, is that the party invoking the rule must have 'relied upon' the

<sup>1</sup> See H. Darwin's comments in Luard (ed.), *The International Regulation of Frontier Disputes* (1970), pp. 207–8.

<sup>2</sup> *I.C.J. Reports*, 1962, pp. 142–6.

<sup>4</sup> *Ibid.*, p. 63.

<sup>3</sup> *Ibid.*, pp. 39–51.



statements or conduct of the other party, either to its own detriment or to the other's advantage. The often invoked necessity for a consequent 'change of position' on the part of the party invoking preclusion or estoppel is implied in this. A frequent source of misapprehension in this connection is the assumption that change of position means that the party invoking preclusion or estoppel must have been led to change its own position, by action it has itself taken consequent on the statements or conduct of the other party. It certainly includes that: but what it really means is that these statements, or this conduct, must have brought about a change in the *relative* positions of the parties, worsening that of the one, or improving that of the other, or both.<sup>1</sup>

If this test were applied to the facts of the case then, Fitzmaurice suggested, it was clear that even if Thailand's acceptance of the boundary had not varied the original treaty obligation, it would estop her from relying on the treaty because a change in the relative position of the parties had occurred as a result of Thailand's conduct. For it was only on the basis that Thailand had accepted the boundary that Cambodia had treated the matter as settled, ignored the activities of Thai provincial officials in the area and confined her own activities to acts of routine administration.

#### THE LAW OF INTERNATIONAL ORGANIZATIONS

Fitzmaurice was a member of the Court when it gave its advisory opinion in the *Jurisdiction of the I.C.A.O. Council* case<sup>2</sup> and voted with the majority in that case. As with the second stage of the *South West Africa* cases,<sup>3</sup> however, he did not deliver a separate opinion and so for an expression of his individual approach to the law of international organizations we must rely on his separate opinion in the *Expenses* case and his long dissenting opinions in the *Namibia* case and the first stage of the *South West Africa* cases.

##### (a) *The Expenses case*

The question in the *Expenses* case was whether the expenditures authorized by certain resolutions of the United Nations' General Assembly were 'expenses of the organization' within the meaning of Article 17 (2) of the Charter. By nine votes to five the Court advised that they were, an opinion of considerable significance as the expenditures in question had been employed to finance controversial peacekeeping operations in Egypt and in the Congo. Fitzmaurice agreed with the Court's conclusion, but sought to clarify a number of points relating to the powers of the Assembly *vis-à-vis* Member States.

The theme of Fitzmaurice's judgment was that the financial powers conferred by Article 17 (2) should not be interpreted so narrowly as to prevent the financing of lawful peacekeeping operations, but be sufficiently circumscribed to relieve Member States of any obligation to finance peace-keeping operations of dubious legality, or activities of a merely permissive character.

<sup>1</sup> Ibid.

<sup>2</sup> *Appeal relating to the Jurisdiction of the I.C.A.O. Council*, Judgment, *I.C.J. Reports*, 1972, p. 46.

<sup>3</sup> *South West Africa (Second Phase)*, Judgment, *I.C.J. Reports*, 1966, p. 6.



The question of the validity of particular expenditures raised the important issue of how far the organs of the United Nations could determine the extent of their own powers. The Court had suggested that 'in the first place at least' this was a matter for the individual organ concerned, but had failed to deal with what was clearly the crucial question, whether, as had been suggested in argument in the case, the organ's decision must be regarded as conclusive. In Fitzmaurice's view it could not be so regarded, since otherwise the powers of the Assembly would be virtually limitless, an interpretation of the Charter that was obviously unreasonable. How then, in the absence of any procedures for compulsory external review, were the limits on the Assembly's powers to be determined? Fitzmaurice agreed with the Court that the solution was to regard resolutions in due form as *prima facie* valid until successfully challenged and added that the only cases in which such a presumption would not arise were those in which 'the invalidity of the expenditure was apparent on the face of the matter, or too manifest to be open to reasonable doubt'.<sup>1</sup>

On the question of what was to be regarded as an 'expense' of the organization, Fitzmaurice again adopted a cautious approach. Pointing out that 'expenses' were not identical to disbursements, he identified the key feature as the right to recover the sum from the membership. This in turn limited recovery to reasonable and necessary sums incurred in the normal course of the organization's activities. More specifically, this covered all regular expenditures which had been treated in practice as expenses of the organization, administrative expenditures, and expenditures arising out of the performance by the organization of its functions under the Charter and the various payments for which the organization was legally responsible. 'Expenses' did not, however, include expenditures stemming from activities outside the Charter performed at the invitation of Member States. Though such activities and the consequent expenditure would be neither illegal nor invalid, Article 17 (2) could have no application to operations lying outside the Charter.

Dealing with the question whether Member States were in all circumstances legally obliged to finance all expenditures qualifying as 'expenses' under Article 17 (2), Fitzmaurice saw the nub of the problem as the non-obligatory character of the majority of the resolutions under which such expenses were incurred. Though there was no problem with decisions of the Security Council, because these were binding on all Members, most peacekeeping operations and a great many other activities had been authorized by recommendations of the Security Council or General Assembly, and it might at first sight seem difficult to reconcile the non-binding character of these measures with the existence of a legal obligation to pay for them.

Fitzmaurice's solution was to suggest a number of important distinctions. States which voted for such resolutions, or abstained, could not object to paying their share of the costs. Where States voted against such recommendations, however, the existence of an obligation to pay required a different justification. In the case of peacekeeping operations and other activities which the organiza-

<sup>1</sup> *I.C.J. Reports*, 1962, p. 205.

tion had a duty to perform, Fitzmaurice found this justification in the principle of majority voting on which, in contrast to the League, the United Nations had been founded.<sup>1</sup>

The Court had suggested that Article 17 (2) might cover activities beyond the powers of the authorizing organ, provided the activities in question were within the powers of the organization as a whole. Fitzmaurice was not prepared to go so far and on this difficult question, in effect whether a broad or narrow view of *ultra vires* should be taken, reserved his opinion. Provided, however, expenditure had been incurred by the proper organ in respect of operations required by the Charter, Fitzmaurice was prepared to hold that even States voting against recommendations were under a legal obligation to pay. This was because '... a majority voting rule is meaningless unless, although the States of the minority are not formally bound as regards their own action, they at least cannot prevent or impede the action decided on from being carried out *aliunde*'.<sup>2</sup>

Fitzmaurice then dealt with a number of special cases. Where a General Assembly resolution had as its sole object the making of a financial contribution, to imply an obligation to pay for such 'action' would for all practical purposes make the recommendation binding, even in respect of those States which had voted against it. Similarly, to hold that an implied obligation to pay arose out of the 'permissive' provisions of the Charter authorizing social and economic activities might create a situation in which a two-thirds majority could instigate large and expensive projects and place a disproportionate burden on the minority of States which contributed the bulk of the organization's finances. In Fitzmaurice's view these were not conclusive objections because there was no clear line between the obligatory and the permissive activities of the organization, which were in any case to some degree interdependent and subject to changing ideas. They were, however, factors which, though no decision on the question was required in the present case, should induce a somewhat cautious approach.

Fitzmaurice felt no such doubts about the position of civil expenditures, for example, technical assistance, incurred in respect of peacekeeping operations. In his view, whatever the general position on the permissive activities of the organization might be, civil expenditures which could be regarded as a part of the organization's peacekeeping activities thereby acquired the character of essential operations, with a consequent legal obligation on the part of Member States to pay for them, however they might have voted.

(b) *The United Nations as 'successor' to the League*

In the largest part of his opinion in the *Namibia* case Fitzmaurice examined the question how far the United Nations could be considered to have succeeded the League in respect of supervision of the Mandate for South West Africa. The Court in its opinion had advanced a number of reasons for holding that such a succession had occurred, with the result that the General Assembly had in 1966 been empowered to revoke the Mandate.

<sup>1</sup> For a description of Lauterpacht's similar view see Fitzmaurice, this *Year Book*, 38 (1962), p. 18.

<sup>2</sup> *I.C.J. Reports*, 1962, p. 212.



Fitzmaurice suggested that this alleged succession to the League's powers could have occurred in only three ways: by a specific arrangement providing for such succession, by means of an implied succession, or by an acceptance by South Africa of the fact that its original obligations to the League were now owed to the United Nations. In its advisory opinion the Court had placed some reliance on each of these. In Fitzmaurice's view none could be sustained. His refutation of each of the possible bases of the succession argument was, of course, addressed primarily to the specific issue of South West Africa and thus does not call for detailed analysis. Certain matters which throw light on Fitzmaurice's approach to issues of interpretation will be reserved until later, and so our present concern will be those features of the opinion which illustrate Fitzmaurice's general approach to the law of international organizations.

On the question whether the United Nations had expressly succeeded to the rights of the League, Fitzmaurice was at pains to demonstrate that the United Nations had been envisaged by its founders as a totally new organization, untainted by what were seen as the failures of the League. It was for that reason that General Assembly Resolution XIV of 12 February 1946, which Fitzmaurice had discussed in his joint dissenting opinion in the 1962 *South West Africa* cases, had deliberately avoided any reference to a 'transfer' of the League's functions. On the particular question of Mandates, Fitzmaurice explained that specific proposals to transfer these to the new organization had been rejected in favour of the creation of the system of United Nations Trusteeships to which it was hoped the Mandates would be voluntarily converted. The fact that this hope had not been realized in the case of South West Africa could not, without violence to basic legal principles, be regarded as a reason for reinterpreting the original situation:

... so far as South-West Africa was concerned, the United Nations backed the wrong horse,—but backing the wrong horse has never hitherto been regarded as a reason for running the race over again! The basic mistake in 1945/1946 was of course the failure either to make the conversion of mandates into trusteeships obligatory for Members of the United Nations, or else expressly to set up an interim regime for non-converted mandates. But by the time *political* awareness of this mistake was fully registered, it was already legally too late;—neither of these things having been done (because in effect the United Nations preferred to trust to luck) it is hardly possible now to treat the situation virtually as if one of them had been. There is surely a limit to which the law can admit a process of 'having it both ways'. The cause of law is not served by failing to recognize that limit.<sup>1</sup>

The above arguments would have also sufficed to remove any question of implied succession, but Fitzmaurice advanced a number of additional reasons for rejecting this possibility. Foremost among them was an assumption of general importance, that there can be no implied succession by one international organization to the rights of another where the difference between the two bodies would have the effect of changing the content of the rights:

... in no circumstances could an obligation to report to and accept supervision at the

<sup>1</sup> *I.C.J. Reports*, 1971, p. 252.



hands of one organ—the League Council—become converted automatically and *ipso facto*, and without the consent of the mandatory (indeed against its will), into an obligation relative to another organ, very differently composed, huge in numbers compared with the League Council, functioning differently, by different methods and procedures, on the basis of a different voting rule, and against the background of a totally different climate of opinion, philosophy and aim, unsympathetic by nature to the mandatory.<sup>1</sup>

The above conclusion involved a rejection of that part of the Court's 1950 advisory opinion in which it had held that because South Africa's obligations in respect of the Mandate had survived the dissolution of the League, the General Assembly had succeeded to the supervisory functions of the League Council. Sir Arnold McNair had disagreed with the Court on this point in the earlier case<sup>2</sup> and Fitzmaurice took a similar view, suggesting that the Court's conclusion was simply a *non sequitur*.

Reliance had been placed on Articles 10 and 80 of the Charter, but Fitzmaurice agreed with McNair's suggestion that neither had the effect ascribed. The first was too general and clearly could not in itself create obligations. As we shall see, Fitzmaurice's discussion of this article parallels his restrictive interpretation of Article 25 of the Charter in another part of this opinion. Article 80, on the other hand, though specifically directed to existing Mandates, in Fitzmaurice's view did no more than preserve them from implied amendment by the Trusteeship articles of the Charter and could not be regarded as a succession provision.

Finally, Fitzmaurice considered the argument of implied succession based on the idea that the United Nations, like the League, was a 'manifestation of the organized world community' and as such must be taken to have acquired its predecessor's rights and duties without the need for any express grant. There could be no clearer example of Fitzmaurice's traditional view of the relationship between States and international organizations and his rigorous insistence on strict proof of legal rights than his rejection of this argument as both specious and fictitious:

. . . the so-called organized world community is not a separate juridical entity with a personality over and above, and distinct from the particular international organizations in which the idea of it may from time to time find actual expression . . . The notion therefore of such a community as a sort of permanent separate residual source or repository of powers and functions, which are re-absorbed on the extinction of one international organization, and then automatically and without special arrangement, given out to, or taken over by a new one, is quite illusory.<sup>3</sup>

We have seen in considering Fitzmaurice's views in the *Expenses* case the importance he attached to consent as a key element in the relationship between States and international organizations. In the *Namibia* case this conviction played a prominent part when Fitzmaurice came to deal with another issue which he had discussed in his 1962 opinion, the question whether South Africa had consented to the exercise by the United Nations of the powers formerly

<sup>1</sup> Ibid., pp. 231, 232.

<sup>2</sup> See *I.C.J. Reports*, 1950, pp. 159–62.

<sup>3</sup> *I.C.J. Reports*, 1971, p. 241.

possessed by the League. In one of the less convincing parts of its opinion the Court had gone some way towards holding that statements made by the South African Government, taken together with various other events, amounted to a recognition that the League's powers in respect of the Mandate were henceforth to be exercised by the General Assembly. The subsequent history of South West Africa made the Court's view of this matter more than a little implausible, and in his dissenting opinion Fitzmaurice made a vigorous presentation of the contrary view.

His starting-point was the general principle that to establish a novation strict proof of consent was required:

It is well established in law that a novation which involves the acceptance of a new and different party, needs consent in order to be good as such;—and, moreover, consent unequivocally and unambiguously expressed, or at least evidence by unequivocal acts or conduct.<sup>1</sup>

Viewed in this light, South Africa's conduct at the relevant time had in Fitzmaurice's view been no more than ambiguous. A number of general statements of intention had been made, but these were declarations of South Africa's intention to administer the territory in accordance with the Mandate. They were not, and in Fitzmaurice's opinion could not be interpreted as, a recognition of the competence of the General Assembly in relation to the territory. As Fitzmaurice pointed out,<sup>2</sup> the Court's failure to make this distinction stemmed from its basic premiss that accountability to the General Assembly was inherent in the survival of the Mandate as an institution. We have already seen that Fitzmaurice, following McNair's argument in the 1950 case, was unable to accept this analysis of one of the crucial features of the case, because in his view consent was the primary issue in determining the relationship between States and international organizations.

Fitzmaurice concluded this part of his opinion with some observations with a bearing on both the relationship between States and international organizations and international law in general. Much had been made in the *Namibia* case of information with which South Africa had voluntarily supplied the General Assembly, as well as a number of the above-mentioned statements of policy.

In Fitzmaurice's view it was altogether wrong to attempt to attach legal significance to such actions:

An important point of international order is here involved. If, whenever in situations of this kind a State voluntarily, and for reasons of policy, brings some matter before an international body, it is thereby to be held to have tacitly admitted an *obligation* to do so . . . then there must be an end to all freedom of political action, within the law and of all confidence between international organizations and their member States. Exactly the same is applicable to attempts to read binding undertakings into the language of what are really only statements of policy. . . .<sup>3</sup>

It is clear that Fitzmaurice's objection here was to the blurring of the boundary between legal and political acts, or, more specifically, the attempt to invest with

<sup>1</sup> *I.C.J. Reports*, 1971, p. 253.

<sup>2</sup> *Ibid.*, p. 257.

<sup>3</sup> *Ibid.*, pp. 262–3.



legal significance acts whose motivation was purely political. Of course the very nature of international law makes it impossible to draw a definitive distinction between legal and political acts. But Fitzmaurice's warning is a reminder that, however difficult it may be in particular cases, a distinction between legal and political acts is essential if States are not to be discouraged from publishing their intentions.<sup>1</sup>

(c) *The implied powers of the League*

The narrow view of implied powers which Fitzmaurice had expressed in the *Expenses* case was underlined when in the *Namibia* case he considered whether the League had ever had the power to revoke the Mandate unilaterally. He began by observing that the Court, in concluding that it had, had relied heavily on the analogy of treaties and contracts, where fundamental breaches by one party had the effect of releasing the other from its obligations. In Fitzmaurice's view the analogy was misleading, for the question was essentially institutional rather than contractual and when, as here, the issue was whether a sovereign State could be deprived of administrative powers it had agreed to exercise, only express provisions could be sufficient to determine the existence and the mode of exercise of any power of revocation. That substantial implied powers have no place in Fitzmaurice's conception of the relation between States and international organizations is apparent from his conclusion that:

. . . within a jurisprudential system involving sovereign independent States and the major international organizations whose membership they make up, there must be a natural presumption *against* the existence of any such drastic thing as a power of unilaterally displacing a State from a position or status which it holds. No implication based on supposed inherency of right—but only concrete expression in some form—could suffice to overcome this presumption,—for what is in question here is not a simple finding that international obligations are considered to have been infringed, but something going much further and involving action—or purported action—of an executive character on the international plane.<sup>2</sup>

Fitzmaurice suggested that a number of considerations supported this interpretation. The functions of the League Council in supervising the Mandate were of a somewhat limited nature and derived solely from the Mandatory's duty to provide it with annual reports. Although, therefore, the Council could comment on the Mandatory's reports and seek to influence its administration of the territory, nothing in the nature of an executive power over the Mandatory's conduct could be identified. This was confirmed by the voting rule of the League Council which was based on the unanimity principle and thereby gave the Mandatory a veto over the Council's actions, a power which was scarcely reconcilable with the idea of a unilateral power to revoke the Mandate.<sup>3</sup>

<sup>1</sup> Fitzmaurice's point here has been persuasively reinforced by a recent commentator on the controversial *Nuclear Tests* cases (*I.C.J. Reports*, 1974, pp. 253 and 457); see Rubin, *American Journal of International Law*, 71 (1977), p. 1.

<sup>2</sup> *I.C.J. Reports*, 1971, p. 268.

<sup>3</sup> On this point Lauterpacht took a different view, which Fitzmaurice examined in this *Year Book*, 34 (1958), pp. 225–9.



Revocability had indeed been discussed when the Mandates system was being devised, but after objections had been raised, it had been decided to include no revocation clause. In these circumstances, said Fitzmaurice, it was out of the question to imply such a power. Finally, having regard to the situation obtaining when the Mandates system was devised, it was, Fitzmaurice suggested, inconceivable that the Mandatories would have subscribed to a system embodying any unilateral power of revocation. In the case of the class C Mandates in particular the clear intention had been to give the Mandatories powers which only just fell short of sovereignty. This could in no way be reconciled with the power of revocation which it was now claimed had existed, but which would at the time have been totally unacceptable to the Mandatory States.

Thus in this section of his opinion Fitzmaurice concluded that the League had never enjoyed the power of revocation which the Court had ascribed to it. Since it was clear that if the United Nations had succeeded to the League's supervisory powers, it could have acquired only such powers as the League had enjoyed, it followed that in purporting to revoke the Mandate by Resolution 2145, the General Assembly had sought to exercise powers it did not have.

(d) *The Charter and the powers of United Nations organs*

In the *Expenses* case, as we have seen, Fitzmaurice had been concerned with the Charter limitations on the powers of the General Assembly and the Security Council and the issue of *ultra vires*. A more detailed discussion of these questions was called for in the *Namibia* case, when Fitzmaurice turned finally to the question of what the position would have been if the League of Nations had had the power to terminate the Mandate without South Africa's consent and the United Nations had acquired the League's powers by succession. His conclusion was that even in these circumstances the United Nations would have been unable to terminate the Mandate, because neither the General Assembly, nor the Security Council, was inherently capable of exercising such a power under the Charter. Fitzmaurice's analysis of the limitations imposed by the Charter on the powers of United Nations organs was naturally directed towards the specific question of the termination of the Mandate. It contains, however, a general discussion of principle, indicative of the far-reaching significance of the issue.

Dealing first with the General Assembly, Fitzmaurice held that with the exception of certain domestic, internal, and procedural powers, the powers of the Assembly were confined to those specified in the Charter. Likewise, it was only in those cases where executive powers were specified that the Assembly could do more than make recommendations. Practice could modify the manner in which an organ exercised its functions, but could not modify the function itself. A modification of function might be achieved where long practice provided evidence of a tacit agreement, but there was a strong presumption against this, particularly when formal procedures for amendment had been specified.

Fitzmaurice then considered the question whether an international organ could acquire powers beyond its constituent instrument by treaty, or through some other external means. After pointing out the significance of the question

which touched, for example, on the question of how far a majority of the membership could validly transfer peacekeeping powers from the Security Council to the General Assembly, Fitzmaurice held that all extramural powers were subject to the constitutional limitations of the organ concerned under the Charter.

In reaching this conclusion Fitzmaurice attached great importance to the Court's advisory opinion in the 1955 *Voting Procedure* case.<sup>1</sup> There the question was whether in exercising its supervisory role in respect of the Mandate the General Assembly could employ its normal majority voting procedure, or must follow the unanimity principle employed by the League. The Court had advised that the normal voting procedure must be followed because mandatory provisions of the Charter could not be altered by treaties imposing additional tasks. In Fitzmaurice's view the *Namibia* situation was a parallel case. For if under the Charter the executive powers of the Assembly did not include the power to revoke the Mandate, then no such power could be acquired by succession and, as a consequence, the powers of the Assembly in respect of the Mandate were confined to the making of recommendations.

Confirmation of this conclusion could in Fitzmaurice's view be found in another of the Court's advisory opinions. In the 1950 *Status of South West Africa* case the Court had advised that 'the competence to modify the international status of the Territory rests with the Union of South Africa, acting with the consent of the United Nations'.<sup>2</sup> As Fitzmaurice pointed out, this view was scarcely compatible with the position taken by the majority in the *Namibia* case, that the General Assembly had the power to revoke the Mandate unilaterally.

Turning to the powers of the Security Council, Fitzmaurice pointed out that here too the power to terminate the Mandate was lacking. In Fitzmaurice's view the Security Council had never purported to terminate the Mandate but had merely attempted to confirm or implement the resolutions of the General Assembly. If those resolutions were invalid, such Security Council confirmation must also be invalid. Even if the Security Council had purported to act independently, however, it would, Fitzmaurice said, have lacked the power to do so. Any supervisory powers over the Mandate were vested in the United Nations as a whole and the Security Council had no greater powers than the Assembly. Indeed, in Fitzmaurice's view it might well have less in view of the fact that in the 1950 advisory opinion the Court had stated that the Assembly was the appropriate organ to exercise supervision.

Fitzmaurice then considered the peacekeeping powers of the Security Council and here too both decided against the contention that these contained any power to terminate the Mandate and made a number of important points of principle. In Fitzmaurice's view the peacekeeping powers conferred on the Security Council by Article 24 of the Charter were confined to those specified in the Chapters referred to therein, viz. Chapters VI, VII, VIII, and XII. This

<sup>1</sup> *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa*, Advisory Opinion, *I.C.J. Reports*, 1955, p. 67.

<sup>2</sup> *I.C.J. Reports*, 1950, p. 144.



meant that only when the Council was acting under Chapter VII and possibly under Chapter VIII did it have the power to bind Member States. But here the Council had not purported to act under either of these Chapters and consequently its actions could not be considered binding. Fitzmaurice added an important comment on the significance of Article 25. That article, which obliges Member States to accept and carry out the decisions of the Security Council, was in Fitzmaurice's view subject to the rest of the Charter. It could not therefore be relied on as a way of making binding Security Council actions taken under provisions of the Charter which did not themselves have that effect.

Suppose the Security Council had acted under Chapter VII in the *Namibia* case and had purported to terminate the Mandate? In Fitzmaurice's view its action would still have been ineffective. For even when acting under Chapter VII the Security Council had no power to abrogate or alter territorial rights because it was 'to keep the peace, not to change the world order, that the Security Council was set up'.<sup>1</sup> That sentence and the paragraph which follows epitomize Fitzmaurice's approach to the role of the United Nations both generally and in relation to the *Namibia* situation. Summarizing his view of the circumscribed role of the Security Council, Fitzmaurice made this observation, which is perhaps a fitting conclusion to our extended discussion of his opinion in the *Namibia* case:

These limitations on the powers of the Security Council are necessary because of the all too great ease with which any acutely controversial international situation can be represented as involving a latent threat to peace and security, even where it is too remote genuinely to constitute one. Without these limitations, the functions of the Security Council could be used for purposes never originally intended,—and the present case is a very good illustration of this: for not only was the Security Council not acting under Chapter VII of the Charter . . . not only was there no threat to peace and security other than such as might be artificially created as a pretext for the realisation of ulterior purposes,—but the whole operation . . . had as its object the abrogation of the Mandatory's rights of territorial administration, in order to secure . . . the transformation of the mandated territory into . . . the sovereign independent State of 'Namibia' . . . this is par excellence the type of purpose, in promoting which, the Security Council (and *a fortiori* Assembly) exceeds its competence, and so acts *ultra vires*.<sup>2</sup>

## INTERPRETATION

### (a) *Text and context*

The proceedings of the Vienna Conference on the Law of Treaties confirmed the view that where treaty interpretation is concerned, international lawyers can be divided into those who regard interpretation as the elucidation of a text, those for whom it is a search for the intentions or expectations of the parties, and those for whom it is a realization of the object and purposes of the agreement. In his extra-judicial writing Fitzmaurice has repudiated both the extreme version

<sup>1</sup> *I.C.J. Reports*, 1971, p. 294.

<sup>2</sup> *Ibid.*, pp. 294–5.



of the intentions approach put forward by McDougal<sup>1</sup> and the teleological method favoured by Lauterpacht<sup>2</sup> and has been a frequent exponent of the textual approach,<sup>3</sup> which also found general support at Vienna.<sup>4</sup> Fitzmaurice's opinions as a member of the Court are a practical illustration of these convictions.

In his judgment at the second stage of the *Temple* case he referred to a number of topographical, historical, and cultural considerations, to which both parties to the dispute had referred extensively in their argument. He agreed with the Court that these had little bearing on the case and explained that when a dispute turned on the interpretation of a treaty settlement and the events which had followed it '... extraneous factors which may have weighed with [the parties] in making the settlement, and more particularly in determining how the line of the frontier was to run, can only have an incidental relevance in determining where today, as a matter of law, it does run'.<sup>5</sup>

This was not, of course, a suggestion that the circumstances of conclusion of a treaty are irrelevant to its interpretation. In other cases, as we shall see, Fitzmaurice regarded these as a most important aid to interpretation. But he was here concerned to make the point that in a case which depended on the significance attached to events subsequent to a treaty, the terms of which were clear, the background to the treaty should not be used to cast doubt on its interpretation.

Further evidence of Fitzmaurice's concern for the text is to be found in his observations that the judge's task is to interpret the text according to its meaning, without regard to its political or other merits. In the *Fisheries Jurisdiction* cases, for example, he stated that the Court's implementation of the jurisdictional clause of the 1961 Exchange of Notes between Britain and Iceland depended on the terms of the clause and not on any view that might be formed as to the merits of the original bargain.<sup>6</sup> Similarly, in the *Namibia* case he pointed out that current condemnation of the Mandates system on ethical grounds had no bearing on the interpretation of the legal obligations that system had created.<sup>7</sup>

Although Fitzmaurice emphasized the primacy of the text, his approach to interpretation cannot be described as rigid or narrow. He has repeatedly emphasized the importance of interpreting words in their context and his regard for the explanatory power of context is a particularly prominent feature of his longer opinions.

For convenience, context may be divided into three parts according to whether

<sup>1</sup> See Fitzmaurice's review of McDougal, Lasswell, and Miller, *The Interpretation of Agreements and World Public Order* (1967), in *American Journal of International Law*, 65 (1971), p. 358.

<sup>2</sup> See this *Year Book*, 39 (1963), pp. 155-61. Fitzmaurice was also critical of Lauterpacht's support for the 'intentions' approach; see *ibid.*, p. 133, and *International and Comparative Law Quarterly*, 17 (1968), pp. 302-14.

<sup>3</sup> See, for example, the views he expressed in this *Year Book*, 28 (1951), p. 1, and *ibid.*, 33 (1957), p. 203.

<sup>4</sup> See Sinclair, *International and Comparative Law Quarterly*, 19 (1970), pp. 60-6.

<sup>5</sup> *I.C.J. Reports*, 1962, p. 53.

<sup>6</sup> *I.C.J. Reports*, 1973, p. 34.

<sup>7</sup> *I.C.J. Reports*, 1971, p. 277.

the words to be interpreted are related to the rest of the text, to the *travaux préparatoires*, or to the circumstances of conclusion of the agreement. About the first little need be said. As one would expect, numerous examples can be found of Fitzmaurice's following the orthodox practice of interpreting a provision by relating it to the remainder of the instrument, instead of reading it in isolation. *Travaux préparatoires* and circumstances of conclusion, both of which played a major part in a number of Fitzmaurice's opinions, are, as we shall see, the key to understanding his approach to interpretation and require a more detailed discussion.

(b) *Travaux préparatoires*

Fitzmaurice's use of *travaux préparatoires* has been governed by his belief 'in the principle of interpreting provisions according to their natural and ordinary meaning in the context in which they occur and (in the absence of any ambiguities or contradictions) without reference to *travaux préparatoires*'.<sup>1</sup> Not surprisingly, however, on a number of occasions the instruments on which the case hinged were found sufficiently ambiguous to justify recourse to *travaux* and Fitzmaurice's opinions contain several examples of his reliance on this aid to interpretation.

In the *Expenses* case he referred to the records of the San Francisco Conference to demonstrate that Article 17 (2) of the Charter was intended to be read as 'a clear statement of the obligations of Members to meet the expenses of the Organization',<sup>2</sup> and not simply as a procedural provision for determining the allocation of expenses. Having established this, he went on to hold that the existence of such an obligation supported the conclusion that States were bound to pay for operations authorized by certain types of recommendation, however they had voted.

In the *South West Africa* and *Namibia* cases Fitzmaurice made extensive references to *travaux* to resolve a number of questions relating to the emergence of the Mandates system and the transition from the League to the United Nations.

In the *South West Africa* cases Fitzmaurice and Spender examined the Report by the Belgian Representative on the League Council, which ultimately formed the basis of the Council's decision to promulgate the Mandate as a Resolution of the League.<sup>3</sup> Here investigation of the *travaux* had the object of demonstrating that the original intention to embody the various Mandates in treaties had been abandoned in favour of framing them as quasi-legislative acts of the Council. With the same aim Fitzmaurice and Spender also examined the amendments to the draft Mandate introduced in the course of the Council's deliberations and used this and other drafting history to show why the Mandate could not be regarded as a 'treaty or convention in force' for the purposes of Article 37 of the Court's Statute.<sup>4</sup> Later in their opinion the two dissenting judges referred to another stage in the devising of the Mandates when they

<sup>1</sup> *I.C.J. Reports*, 1962, p. 550.

<sup>2</sup> *Ibid.*, p. 209.

<sup>3</sup> *Ibid.*, pp. 483-6.

<sup>4</sup> *Ibid.*, pp. 489-90.

examined the discussion of the draft Mandates which had taken place in the Mandates Commission of the League and, as we have seen, found that these records indicated that the words 'any dispute whatever' in Article 7 of the Mandate had been intended to cover only disputes relating to its 'national rights' provisions.<sup>1</sup> In the *Namibia* case Fitzmaurice's discussion of the origins of the Mandate was directed to the issue of revocability, and he reinforced his conclusion that no such power had ever been held by the League by pointing to the fact that a United States' proposal to insert a provision dealing expressly with revocation had been rejected at an early stage.<sup>2</sup>

The question of how far the United Nations had succeeded to the powers of the League also called for extensive review of *travaux*. In both the *South West Africa* and the *Namibia* cases Fitzmaurice made a detailed examination of discussions in the Preparatory Commission of the United Nations to refute the argument that the United Nations had been envisaged as the League's successor and should therefore be regarded as invested with its powers in respect of the Mandate.<sup>3</sup> This analysis was relevant both to the interpretation of the term 'Members of the League' in Article 7 of the Mandate and to the question of the survival of the alleged power of revocation. With a view to demonstrating that no succession had occurred, Fitzmaurice also examined the proceedings at the final meeting of League and the first sessions of the General Assembly,<sup>4</sup> and to show that no succession could be implied from South Africa's actions examined the records of the San Francisco Conference and a number of other discussions.<sup>5</sup>

### (c) *Circumstances of conclusion*

Further evidence of Fitzmaurice's belief in the importance of context is provided by his extensive discussion of the historical setting of treaties and other legal instruments.

In the *Fisheries Jurisdiction* cases he examined the 1961 Exchange of Notes on which the jurisdiction of the Court was founded against the background of the law of the sea as it stood in 1961, in order to demonstrate that British recognition of Iceland's exclusive fishery was, in the then state of the law, a genuine *quid pro quo* for Iceland's agreement to submit to the Court disputes arising out of the agreement. At the second stage of the *Temple* case he explained how the unsettled state of the frontier between Thailand and Cambodia confirmed the intention of the two States to achieve a definitive settlement by the treaty of 1904. In the *Barcelona Traction* case, as we have seen, he took into account the probable significance of the Second World War in determining the likely content of trust deeds which the Court had not been able to examine directly. And in the *Expenses* case he showed that the intention behind Article 17 (2) of the Charter was to impose a uniform financial obligation on Member States, by taking into

<sup>1</sup> Ibid., pp. 554-8.

<sup>2</sup> *I.C.J. Reports*, 1971, p. 274.

<sup>3</sup> Ibid., pp. 243-6; *I.C.J. Reports*, 1962, pp. 536-7.

<sup>4</sup> *I.C.J. Reports*, 1971, pp. 246-9; *I.C.J. Reports*, 1962, pp. 530-40.

<sup>5</sup> *I.C.J. Reports*, 1971, pp. 254-62; *I.C.J. Reports*, 1962, pp. 533-4.



account the intention to make majority voting, not unanimity, the rule in the General Assembly.

It was, however, in his two dissenting opinions that Fitzmaurice's focus upon the circumstances of conclusion of a text assumed the greatest importance. As has been seen, the argument of the majority in the 1962 *South West Africa* cases and the *Namibia* advisory opinion treated the Mandate, not as a fixed set of obligations, but as the embodiment of a principle, the legal implications of which could be determined by current ideas. Fitzmaurice's disagreement in both cases stemmed from his adoption of an exactly opposite approach. His major premiss, that the legal significance of acts is almost entirely determined by the circumstances in which they are performed, is a recurrent theme in both opinions.

In his opinion in the *Namibia* case, for example, Fitzmaurice dealt at length with the historical background to the Mandates system in order to demonstrate that the intention of all concerned was to give the Mandatories rights akin to sovereignty, an intention that was clearly incompatible with the right of unilateral revocation which the Court had imputed to the League. In the same way in the *South West Africa* cases Fitzmaurice sought to show that the circumstances in which the Mandates had been created contained no indication that judicial supervision of the Mandatory's obligations towards the League was intended to play the role assigned to it in the Court's decision. In the same case he made an unambiguous statement of his view that the legal effect of consent depends on the situation at the time, when he rejected the argument that South Africa must be taken to have submitted to the Court's jurisdiction at the instance of former Members of the League and said:

The *scope* of any consent given, must necessarily be assessed in the light of the circumstances as known and existing at the time when the consent was given. Equally, if that consent is to relate to future events, then it must be assessed in the light of what could reasonably have been foreseen at the time, as to those events.<sup>1</sup>

In Fitzmaurice's view the legal effects of the crucial transition from the League to the United Nations must be determined by the same investigation of the contemporary situation. Thus in both dissenting opinions, as we have seen, the question of how far South Africa's duties had survived the dissolution of the League was answered by means of a detailed review of the circumstances surrounding the creation of the United Nations Trusteeship System and the deliberate policy of making no provision for the continuation of surviving Mandates. In the *Namibia* case the purpose of this review was to demonstrate that the United Nations had not succeeded to any power of revocation exercisable by the League; in the *South West Africa* cases to show that Article 7 of the Mandate had not survived the dissolution of the League. In both cases the objective was the same: to show that in large measure the Mandate had been abrogated by the disappearance of the League and to prove this by a detailed analysis of the historical setting of that event.

<sup>1</sup> *I.C.J. Reports*, 1962, p. 546.

*(d) Subsequent practice*

The preceding discussion of Fitzmaurice's emphasis on the textual and contextual aspects of interpretation may suggest that he has regarded events subsequent to the production of a text as having little relevance to its interpretation. In the sense that he has strongly condemned what he sees as attempts to base arguments on hindsight, this is certainly correct. He has not, however, altogether rejected subsequent practice as an aid to interpretation, though his reluctance to appear to be devaluing the text has induced a generally cautious approach.

At the merits stage of the *Temple* case Fitzmaurice considered the possibility that, as an alternative way of presenting her case, Thailand might have argued that the erroneous delimitation of the frontier should be treated as an integral part of the boundary settlement provided for by the treaty of 1904. He concluded, however, that this approach to the case would not have changed his decision, because the map line would in the circumstances have prevailed over the delimitation provisions of the treaty.<sup>1</sup> These comments were not, properly speaking, concerned with subsequent practice, but rather with later events which might have been treated as part of the original treaty.

Subsequent practice was an issue in the *Expenses* case, where Fitzmaurice considered the relevance of the financial practice of the General Assembly to the interpretation of Article 17 (2) of the Charter. In his view the general principle was that:

... the interpretation in fact given to an international instrument by the parties to it is good presumptive (and may in certain cases be virtually conclusive) evidence of what the correct legal interpretation is. . . .<sup>2</sup>

This was, however, subject to the important condition that:

... where this is the case, it is so because it is possible and reasonable in the circumstances to infer from the behaviour of the parties that they have regarded the interpretation they have given to the instrument in question as the legally correct one, and have tacitly recognized that in consequence certain behaviour was legally incumbent upon them.<sup>3</sup>

The importance of this qualification in the *Expenses* case lay in States' ability to make voluntary contributions to the United Nations, which in Fitzmaurice's view made it impossible to interpret States' payment of contributions as evidence that they recognized a legal obligation to do so.<sup>4</sup> For this reason he deprecated the Court's reliance on practice in its advisory opinion and, while recognizing the significance of practice in appropriate cases, added the warning that 'The argument drawn from practice, if taken too far, can be question begging.'<sup>5</sup>

A similarly cautious approach was evident in his opinion in the *Namibia* case, where, as we have seen, he was concerned lest a lax approach to subsequent practice should be a means of extending the powers of international organizations beyond their constitutional limits. Speaking with reference to the implied powers of the General Assembly, Fitzmaurice said:

... whereas the practice of an organization, or of a particular organ of it, can modify the

<sup>1</sup> Ibid., pp. 65-6.

<sup>2</sup> Ibid., p. 201.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.



manner of exercise of one of its functions (as for instance in the case of the veto in the Security Council which is not deemed to be involved by a mere abstention), such practice cannot, in principle, modify or add to the function itself. Without in any absolute sense denying that, through a sufficiently steady and long continued course of conduct, a new tacit *agreement* may arise having a modificatory effect, the presumption is against it,—especially in the case of an organization whose constituent instrument provides for its own amendment. . . .<sup>1</sup>

In his decision in the *South West Africa* cases Fitzmaurice justified his view of the narrow scope of the judicial protection provided for in the Mandates system by pointing to the fewness of the occasions on which States had relied on the adjudication clauses of the Mandates.<sup>2</sup> It is perhaps significant that here, the only place in which Fitzmaurice employed subsequent practice as a significant aid to interpretation, the practice in question in no way modified the original obligation, but was used to confirm an interpretation already arrived at through analysis of the language and background of the text.

#### (e) *Subsequent events*

If Fitzmaurice has been reluctant to rely on subsequent practice, he has entirely rejected the idea that other subsequent events can be relevant to interpretation. The attempt to use such events, either explicitly or implicitly, he denounced as the indefensible introduction of hindsight into interpretation.

In the *Fisheries Jurisdiction* cases he pointed out the irrelevance of recent developments in the law of the sea to the interpretation of the adjudication provisions in the 1961 Exchange of Notes, and summed up his view with the observation that 'It is obviously galling to any man (but also a common experience) if he finds that owing to a subsequent decline in prices he has paid more for something than he need have done. But this is not in itself a ground on which he can ask for his money back.'<sup>3</sup>

In the above case the Court overwhelmingly rejected the elements of hindsight on which the Icelandic argument largely depended. In the *South West Africa* and *Namibia* cases, however, it was the Court's recourse to hindsight that Fitzmaurice identified as the source of his dissent. In the *Namibia* case, where his emphasis on the original character of the Mandate contrasts sharply with the *ex post facto* character of much of the Court's reasoning, Fitzmaurice prefaced his dissent with a succinct statement of the difference between the Court's method and his own:

My reading of the situation is based—in the orthodox fashion—on what appears to have been the intentions of those concerned at the time. The Court's view, the outcome of a different, and to me alien philosophy, is based on what has become the intentions of new and different entities and organs fifty years later. This is not a legally valid criterion, and those thinking of having recourse to the international judicial process at

<sup>1</sup> *I.C.J. Reports*, 1971, p. 282 (original emphasis). Earlier Fitzmaurice had expressed a similar view extrajudicially: see this *Year Book*, 33 (1957), pp. 223–5.

<sup>2</sup> *I.C.J. Reports*, 1962, p. 525.

<sup>3</sup> *I.C.J. Reports*, 1973, p. 30.



the present time must pay close attention to the elaborate explanation of its attitude on this kind of matter which the Court gives in its opinion.<sup>1</sup>

It was, however, in his earlier dissenting opinion in the *South West Africa* cases that Fitzmaurice's total rejection of hindsight found its most vigorous expression. The Applicants had argued that an extended reading of Article 7 could be based on the presumed intention of the original parties. Spender and Fitzmaurice considered this argument untenable, because the break-up of the League had clearly been neither anticipated, nor provided for in the Mandate and in their view hindsight had no place in interpretation:

What the Applicants are really asking the Court to do, is to interpret Article 7 in the light of the presumed intentions of the parties as these might have been expected to be had they foreseen not only that the League would be dissolved, but the circumstances in which this would occur, i.e. that the League would be followed by the United Nations, that the trusteeship system would be set up, and so on. But it is not a legitimate process of interpretation to read a provision on the basis of presumed intentions deduced in the light of nothing but after-knowledge. One can only deduce intentions in the light of what the parties might reasonably have been expected to foresee at the time, and not on what those intentions might have been had the parties had an actual foreknowledge of the future, which they could never in fact have had.<sup>2</sup>

For similar reasons Spender and Fitzmaurice rejected the argument that the survival of the Mandate as an institution led to the conclusion that Article 7 survived as a provision capable of being invoked by States. They suggested that as a matter of logic the survival of Article 7 as part of the Mandate could not affect its interpretation, which must depend upon the circumstances of its original inclusion. Moreover, international obligations were commonly severable and Article 7 was not of such an essential character that it fell outside the general rule. The Mandates system was not designed to impose solutions on the Mandatory, through judicial action or otherwise, and the idea of using individual States to litigate on behalf of the League Council would have been unthinkable in 1920. In the view of Spender and Fitzmaurice the Court's approach to Article 7 embodied a doctrine which must be rejected, the doctrine of 'subsequent necessity':

What has happened is that a provision which was originally of incidental importance and, as will be seen, practically never used, has, because of recent events, acquired an importance, and is seen (because of Article 94 of the Charter) to have potentialities which it did not originally possess. In present circumstances, so it is argued, it is only through Article 7 that any control can be achieved over the mandatory. This may be understandable, but it is not a valid *legal* argument . . . subsequent events may affect the *importance* of a provision: they cannot affect its intrinsic legal character which, by reason of the principle of 'contemporaneity' in interpretation, must be adjudged on the basis of the place the provision occupied in the context of the system or framework it formed part of at the time when the latter was set up. Changes in this context may

<sup>1</sup> *I.C.J. Reports*, 1971, p. 223.

<sup>2</sup> *I.C.J. Reports*, 1962, pp. 514, 515.

increase the importance of the provision concerned: they do not alter its intrinsic legal character, or give rise to new rights in respect of it.<sup>1</sup>

The emphasis which Fitzmaurice placed on contemporaneity in these opinions left little room for the teleological principle of interpretation. As we have seen, there are many points on which Fitzmaurice's views accord with those of Sir Hersch Lauterpacht. On this principle, however, they clearly differ. Fitzmaurice's view of the irrelevance of subsequent events in the *South West Africa* cases and elsewhere was a virtual rejection of the teleological principle, at least where international institutions were concerned. In his individual opinion in the *South West Africa Petitioners* case<sup>2</sup> in 1956, however, Lauterpacht had utilized just such a principle to justify an extended interpretation of the powers of the General Assembly in relation to the Mandate. That Fitzmaurice's approach would have been different is apparent from the reservations he expressed when he examined this opinion in the second of his articles discussing Lauterpacht's contribution to the Court.<sup>3</sup> He subsequently explained these misgivings when he described the teleological approach as:

. . . a heady concept that can easily intoxicate and seem so right as to be virtually incontrovertible! Its temptations, ethically and ideally—politically also—are evident. Its juridical dangers are no less so. Carried to an extreme (or even to more than moderate lengths) it would impart to many international acts a legislative or quasi-legislative character which the international community may organically stand in need of, but which it is not yet functionally equipped to support.<sup>4</sup>

#### (f) *Principles and presumptions*

Fitzmaurice's use of the various materials we have described has been supplemented by a number of principles and presumptions. Some, like the presumption of good faith he used to circumscribe the peacekeeping powers of the Security Council in the *Expenses* case, are so much the currency of every lawyer that they require no discussion here. Others, notably the presumption against a broad interpretation of the implied powers of international organizations and the corresponding presumption in favour of national sovereignty, have already been discussed. There remain a number of principles of interpretation which, although in themselves unremarkable, do merit our attention. For, as we shall see, the selection of these principles as appropriate to the case in hand, and the construction put upon them are both highly characteristic of Fitzmaurice's particular style of interpretation.

In the *Namibia* case Fitzmaurice attached particular importance to a principle of interpretation which he stated as follows:

Where a particular proposal has been considered but rejected, for whatever reason,

<sup>1</sup> Ibid., p. 521. See also Fitzmaurice's discussion of this point in this *Year Book*, 33 (1957), pp. 225-7.

<sup>2</sup> *Admissibility of Hearings of Petitioners by the Committee on South West Africa*, Advisory Opinion, *I.C.J. Reports*, 1956, p. 23.

<sup>3</sup> See this *Year Book*, 38 (1962), pp. 24-9.

<sup>4</sup> This *Year Book*, 39 (1963), p. 140; see also pp. 155-61.



it is not possible to interpret the instrument or juridical situation to which the proposal related as if the latter had in fact been adopted.<sup>1</sup>

In both the *Namibia* and the *South West Africa* cases Fitzmaurice used this principle to demonstrate that an analysis of the relevant *travaux préparatoires* precluded certain inferences, which it had been argued could be drawn from the texts in question. In the *Namibia* case, as we have seen, Fitzmaurice rejected both the argument that the League Council had ever possessed an implied power to revoke the Mandate and the suggestion that the League's powers in respect of the Mandate had been inherited by the United Nations. On each issue, the fact that the *travaux* revealed that such proposals had been made, but rejected, formed an important part of his reasoning. In the *South West Africa* cases, similarly, his rejection of the argument that the Mandate could be regarded as a 'treaty or convention in force' for the purposes of Article 37 of the Statute was, as already noted, supported by his finding that a proposal to issue the Mandates in treaty form had been abandoned at an early stage.

The significance of Fitzmaurice's recourse to the above principle lies not in its novelty, for it is of course an entirely orthodox principle of interpretation, but in the way in which the Court avoided Fitzmaurice's conclusion. Using the same *travaux préparatoires*, the Court was able to conclude that the implied powers in question existed by treating an explanation of why the relevant proposals had been rejected as a denial of the relevance of the rejection. Fitzmaurice regarded this as a dismal expedient:

... to establish the *reasons* for something is not to cancel out the *result*, as the Opinion of the Court often seems to be trying to maintain. Reliance on the proposition that, to find a satisfactory explanation of *why* a proposal was not adopted, is equivalent to demonstrating that it was not really *rejected*;—and so it must be treated as if it had 'really' been *adopted*, cannot enhance respect for law as a discipline.<sup>2</sup>

In his judgment in the *South West Africa* cases Fitzmaurice was no less critical of the Court's approach to another principle of interpretation. As we have seen, one of the issues in that case was whether the applicants could be deemed to be 'Members of the League' for the purposes of Article 7 of the Mandate. The Applicants relied *inter alia* on the 'principle of maximum effect'. In their joint dissenting opinion Spender and Fitzmaurice scrutinized this principle, describing its scope as follows:

This principle is one which can be employed in order to give as full a scope to a provision as is *reasonably* consistent with its language, and with the general circumstances of the case; but only if such an interpretation would be so consistent. It cannot be employed to 'rewrite' a provision in a manner positively inconsistent with, or even actually contrary to what it says. Equally, its application must be excluded if the circumstances are such as to evidence a complete lack of any basis for the interpretation that would result.<sup>3</sup>

<sup>1</sup> *I.C.J. Reports*, 1971, p. 275.

<sup>2</sup> *Ibid.*, p. 251.

<sup>3</sup> *I.C.J. Reports*, 1962, p. 512. Fitzmaurice expressed similar views extrajudicially in this *Year Book*, 33 (1957), pp. 220-3, and *ibid.*, 39 (1963), pp. 161-4.



They suggested that in the *Peace Treaties* case the Court had used the principle in this form, but that in the present case the broad reading of Article 7 was so unreasonable that the principle could have no application.

As an example of a situation where Fitzmaurice considered that the principle could be applied we may perhaps take his discussion in the *Namibia* case of the power of the Court to appoint a judge *ad hoc*.<sup>1</sup> There the main question was the interpretation of Article 68 of the Court's Statute and Article 83 of the Court's Rules. The former provided that in advisory proceedings the Court should be guided by the provisions of the Statute relating to contentious cases to the extent that they were regarded as applicable. Article 83 of the Rules provided for the appointment of a judge *ad hoc* in advisory proceedings where those proceedings concerned 'a legal question actually pending between two or more States'. Fitzmaurice held that the provisions of Article 83 were merely an illustration of the general power contained in Article 68 and Article 83 was therefore not exhaustive of the circumstances in which an *ad hoc* judge could be appointed for advisory proceedings. In reaching this conclusion Fitzmaurice did not refer to any principle of interpretation. But from his treatment of the issue and particularly his attack on the contrary argument, it is clear that his concern was to interpret Article 68 in the broadest way consistent with its language and purpose.

A similar example is provided by his discussion of one of the subordinate issues in the *Expenses* case, touched on earlier. It had been argued that when peacekeeping operations of a military nature were undertaken by the General Assembly any civil expenditures arising out of them were 'tainted' with illegality and therefore did not qualify as 'expenses of the organization' within Article 17 (2) of the Charter. Fitzmaurice reversed this argument, holding that the military operations in question were legal and that any associated civil expenditures were likewise to be regarded as 'expenses of the organization' to which all Members were bound to contribute.<sup>2</sup> Again the principle of effectiveness can be seen at work. Fitzmaurice's reason for holding that these civil expenditures involved an obligation to pay, though independent civil expenditures might not, was that the military and civil aspects of peacekeeping were in his view inseparable. Hence the basis of Fitzmaurice's reasoning was that Members should pay for both military and civil operations, because such an obligation could be inferred from the language of the Charter and was justified by the need to ensure that United Nations peacekeeping was effective.

Fitzmaurice's application of the effectiveness principle can be regarded as complemented by his view that: 'Where a provision . . . is so worded that it can only have one effect, any intended exceptions, in order to be operative, must be stated in terms.'<sup>3</sup> Fitzmaurice employed this principle in the *Namibia* case to determine the circumstances in which the League Council had been entitled to depart from the unanimity principle. It had been argued, as we have seen, that the League Council had possessed the power to revoke the Mandate without the

<sup>1</sup> *I.C.J. Reports*, 1971, pp. 308-17.

<sup>2</sup> *I.C.J. Reports*, 1962, p. 215.

<sup>3</sup> *I.C.J. Reports*, 1971, p. 273.

consent of the Mandatory. Since the Mandatories were entitled to attend the Council and vote, the alleged power of unilateral revocation would necessarily have involved a departure from the rule that decisions of the Council must be unanimous. But in the Covenant the exercise of this power was not mentioned as one of the exceptions to the unanimity rule, indeed it was not mentioned at all. Hence, applying the above principle of interpretation, Fitzmaurice found that no power of unilateral revocation could be implied.

Another principle of interpretation relied on in the *Namibia* case was that:

Where a right or power has not been the subject of a specific grant, but exists only as corollary or counterpart of a corresponding obligation, this right or power is necessarily defined by the nature of the obligation in question, and limited in its scope to what is required to give due effect to such correlation.<sup>1</sup>

Fitzmaurice used this principle to determine the extent of the supervisory jurisdiction exercisable by the League in respect of the Mandate. The Mandatory's obligation was to make annual reports to the League Council, describing its administration of the territory and its performance of its duties under the Mandate. The powers of the League Council were unspecified and had therefore to be implied as a corollary of this obligation. Applying the above principle of interpretation, Fitzmaurice held that the limited obligations of the Mandatory implied a correspondingly limited power in the Council, and so limited a power could not be reconciled with the alleged right of unilateral revocation:

The Council could exhort, seek to persuade and even importune; but it could not require or compel—and it is not possible, from an obligation which, on its language, is no more than an obligation to render reports of a specified kind, to derive a further and quite different obligation to act in accordance with the wishes of the authority reported to. This would need to be separately provided for. . . .<sup>2</sup>

### JUDICIAL PHILOSOPHY

Perhaps the most striking feature of Fitzmaurice's philosophy is his emphasis in these opinions on the special character of law and legal institutions. The reputation and integrity of the Court, for example, were soon revealed as one of his principal concerns and provided a theme to which he constantly returned. Thus in the *Barcelona Traction* case he delivered a strongly worded defence of the Court against charges of procrastination. In its judgment the Court had taken the unusual step of repudiating these allegations. Fitzmaurice expressed his full approval and indicated that he took an equally serious view of a number of similar misrepresentations.<sup>3</sup>

As we have seen, he has been acutely sensitive to the possibility of exceeding the limits of the judicial function. While stressing the *compétence de la compétence* as an essential aspect of the Court's independence, he regarded the requirement of consent as an insuperable obstacle to the broadening of the Court's jurisdiction and so refused to countenance what he saw as an unwarranted enlargement

<sup>1</sup> Ibid., pp. 269–70.

<sup>2</sup> Ibid., pp. 270–1.

<sup>3</sup> *I.C.J. Reports*, 1970, p. 113.



of the Court's role in respect of dependent territories in the *South West Africa* and *Namibia* cases.

His detailed investigation of the issue of propriety is further evidence of his conception of the Court's special role. We have seen how in the *Northern Cameroons* and *Namibia* cases he repudiated the view that the Court could concern itself with abstract or hypothetical issues and in the *South West Africa* cases questioned whether the issue before the Court was of an intrinsically legal nature. His discussions of the concept of a dispute and his rejection of the argument that the proceedings of international organizations were equivalent to traditional diplomatic negotiations for the purposes of admissibility and jurisdiction were further ways in which he sought to maintain the special character of the Court by sharply defining the subject-matter of international litigation.

Fitzmaurice's view of international law corresponds to his view of the Court, and the unique character of the judicial process finds its parallel in the distinctive properties of international law. In his view law is uniquely concerned with justice, and a passionate concern for both substantive and procedural justice is a recurrent feature of his decisions. In the *Barcelona Traction* case, as we have seen, he suggested that international justice demanded that judicial notice be given to the subject of foreign bankruptcy proceedings.<sup>1</sup> In the *Fisheries Jurisdiction* cases he took strong exception to Iceland's policy of refusing to recognize the Court, whilst carefully ensuring that its arguments were brought to the Court's attention, a practice which, he said, was 'unfortunately open to the interpretation of being designed, on the one hand, to place Iceland in almost as good a position as if she had actually appeared in the proceedings . . . while on the other hand enabling her, in case of need, to maintain that she does not recognize the legitimacy of the proceedings or their outcome'.<sup>2</sup>

It is, however, the *Namibia* case that contains Fitzmaurice's most memorable account of the requirements of international justice. In that case Fitzmaurice gave his reasons for opposing the Court's earlier order under which South Africa had been refused the right to appoint a judge *ad hoc*. After explaining why in the present circumstances the Court had the power to make such an appointment, despite the apparently restrictive wording of Article 83 of the Rules, Fitzmaurice argued that the appointment of an *ad hoc* judge would have been justified by the contentious features of the case,<sup>3</sup> a clear endorsement of the principle that an accused party is entitled to be represented. In Fitzmaurice's view the actions of the General Assembly, which were the subject of the case, could be criticized on similar grounds. By purporting to terminate the Mandate the Assembly had assumed a judicial function which, as we shall see, Fitzmaurice regarded as *ultra vires*. It had, moreover, acted as a judge in its own cause by both bringing the charge and giving the decision and had flagrantly failed to accord South Africa any of the rights to which a defendant in judicial proceedings was entitled.<sup>4</sup> With the same considerations in mind Fitzmaurice had, in an earlier part of his opinion, criticized in the strongest possible terms the Court's

<sup>1</sup> *I.C.J. Reports*, 1970, pp. 106-10.

<sup>2</sup> *I.C.J. Reports*, 1973, p. 35.

<sup>3</sup> *I.C.J. Reports*, 1971, pp. 313-16.

<sup>4</sup> *Ibid.*, p. 300.



refusal to allow South Africa to adduce evidence of the effects of its policy of *apartheid* with a view to defending itself against the charge of having broken its duties under the Mandate.<sup>1</sup> In Fitzmaurice's view the Court's refusal to admit this evidence on the ground that the policy was self-evidently detrimental to the welfare of the inhabitants of the territory was a violation of basic principles of justice which could only endanger the Court's authority.

It is clear that justice in Fitzmaurice's view means justice according to law and this, he believes, demands a clear separation between legal and political issues. His impatience with what he saw as the confusion of law and politics in the *Namibia* and *South West Africa* cases is apparent in his dissenting opinions and led him on more than one occasion to dismiss what he called 'pleas of a purely subjective character'.<sup>2</sup> But it is important to notice that this approach has served a double purpose. If its frequent result has been the rejection of issues as legally irrelevant or unsuitable for judicial determination, in the *Namibia* case it had exactly the opposite effect. For there Fitzmaurice emphasized the General Assembly's incompetence to determine whether the Mandate should be revoked and based his argument on the incompetence of a political body to make an essentially judicial determination:

In the institutional field, the justification for the act of some organ or body may turn upon considerations of a political or technical character, or of professional conduct or discipline, and if so, the political, technical or professional organ or body concerned will, in principle be competent to make the necessary determinations. But where the matter turns, and turns exclusively, on considerations of a legal character, a political organ, even if it is competent to take any resulting action, is not itself competent to make the necessary legal determinations on which the justification for such action must rest. This can only be done by a legal organ competent to make such determinations.<sup>3</sup>

This view of law as something essentially separate from politics is further reflected in the sharp distinction Fitzmaurice has drawn between the *lex lata* and proposals *de lege ferenda*. In the *Barcelona Traction* case, as we have seen, he expressed his reluctant agreement with the Court's conclusion that despite the Belgian nationality of the Company's shareholders Belgium had no *locus standi* to exercise diplomatic protection on its behalf. He suggested, however, that equity could ameliorate the situation and in a revealing passage explained what he had in mind:

There have been a number of recent indications of the need in the domain of international law, of a body of rules or principles which can play the same sort of part internationally as the English System of Equity does, or at least did, in the Common Law countries that have adopted it. Deciding a case on the basis of *rules* of equity, that are part of the general system of law applicable, is something quite different from giving a decision *ex aequo et bono*, as was indicated by the Court in . . . its judgment in the *North Sea Continental Shelf* case. . . .<sup>4</sup>

There is much here that is typical of Fitzmaurice's approach to international

<sup>1</sup> Ibid., pp. 222-3.

<sup>2</sup> Ibid., p. 250 n. 29.

<sup>3</sup> Ibid., p. 299.

<sup>4</sup> *I.C.J. Reports*, 1970, p. 85.

law. Equity is invoked as a means of correcting a situation of patent injustice on behalf of those who would otherwise be without an effective legal remedy; the prominence of considerations of individual justice in Fitzmaurice's opinions has already been noted. But the care to distinguish an equitable judgment from a decision *ex aequo et bono* indicates that his position involved no sacrifice of what he saw as the essence of the judicial function. This is no idiosyncratic palm tree justice, but a system of rules and principles, equitable in content but as much a part of international law as any treaty or custom. Finally, and most significantly, in his decision in the case Fitzmaurice did not pursue the equitable solution, despite its obvious merits, but followed the established law. He acknowledged the possibility and indeed the desirability of the Court's employing equitable considerations, as it did in the *North Sea Continental Shelf* cases, yet he did not see it as an appropriate basis for his own opinion.

In the *North Sea Continental Shelf* cases<sup>1</sup> Fitzmaurice delivered no individual opinion but supported the Court's application of equitable principles. It is difficult to believe that had the Court followed the same course in *Barcelona Traction* he would not have done the same. By raising the equitable issue in his separate opinion, Fitzmaurice indicated his awareness of both the problem and its solution; by following the law he demonstrated that his approach to international law is fundamentally conservative and that, though sensitive to the need for change, he prefers to follow the established rule until a new rule can be confirmed by the proper authority.

Fitzmaurice has approached the law of international organizations in a similar spirit. Far from conceiving them as 'manifestations of the organized world community' or other noble abstraction, Fitzmaurice, as we have seen, has regarded international organizations as fundamentally contractual entities possessed of few powers beyond those specifically conferred by their constituent instruments. Hence the narrow approach to implied powers in the *Namibia* opinion, the cautious attitude towards the financial powers of the General Assembly in the *Expenses* case, and the emphasis upon consent as the key to the question of succession in the *South West Africa* cases. In these opinions Fitzmaurice did not, of course, deny the political importance of the institutions in question, nor the legal significance of their activities. He was, however, concerned to maintain the principle that their powers were limited by international law and to construe those limitations strictly.

Because Fitzmaurice's major pronouncements on interpretation were all made in cases concerned with the powers of international organizations, the assumptions described in the previous paragraph go far to explain the approach to interpretation revealed by his individual opinions. In the cases we have considered, Fitzmaurice's tendency was to prefer the narrower interpretation. His rejection of the teleological approach and emphasis on the text and its historical background are reflected in his selection of principles of interpretation. The various principles relied on in the *Namibia* case are almost all of a restrictive nature. Even the effectiveness principle, a principle of apparent breadth and

<sup>1</sup> *North Sea Continental Shelf*, Judgment, *I.C.J. Reports*, 1969, p. 3.



potential, is referred to only once explicitly and that with a view to demonstrating its narrow scope and irrelevance to the case in hand.

It would be wrong to draw from this the conclusion that Fitzmaurice's approach to interpretation has been wholly restrictive or that his decisions were the product of an excessive semanticism, or narrow pedantry. As we have seen, his emphasis on the importance of the text precluded neither an extensive use of *travaux préparatoires*, nor frequent excursions into the circumstances of the conclusion of a text. Likewise, the examples we have mentioned of his use of the effectiveness principle lose nothing by comparison with the adventurous interpretations of the Court which prompted his two dissents.

Yet it is surely significant that throughout his membership of the Court so much of Fitzmaurice's energy was devoted to demonstrating the proposition that the broader view of the text was wrong. Fitzmaurice's approach to interpretation was strict because his conception of international law is fundamentally conservative. The *Namibia* and *South West Africa* cases, both of which arose out of an extreme tension between the political ideas of the present and those of the past, highlighted this. But the same evidence is to be found in a less striking form in his opinion in the *Expenses* case. There, though he agreed with the Court, the importance of his opinion lies in its qualification of the Court's judgment, his careful description of what was *not* in issue, and his indication of why the implications of the judgment needed deliberation.

### CONCLUSION

Fitzmaurice's contribution to international law as a judge of the Court has been a many-sided one. On particular topics, as we have seen, his scholarly analysis of highly technical issues produced precise and lucid statements of law. Outstanding examples are his discussion of estoppel in the *Temple* case, his examination of the relationship between jurisdiction and admissibility in the *Northern Cameroons* case, and his treatment of the variety of issues in the *Barcelona Traction* case, and there are many others.

But Fitzmaurice's individual opinions contain something that may in the long term be more important than any of these. Taken together they constitute a magnificent statement of a traditional philosophy of the rule of law. Prominent in that philosophy is the notion that law and politics are distinct and that the preservation of that distinction is one of the judge's primary duties. Long before his appointment to the Court Fitzmaurice suggested that:

The social function which law has to perform is precisely that of supplying the legal element so necessary in international, as in human affairs, and so indispensable to a full and satisfactory consideration and settlement of the problems that arise. But the value of the legal element depends on its being free of other elements, or it ceases to be legal. This can only be achieved if politics and similar matters are left to those whose primary function they are, and if the lawyer applies himself with single-minded devotion to his legal task. It is not a spectacular task, it does not attract the limelight or gain the headlines; but properly done, it is infinitely worthwhile and infinitely



rewarding. By practising this discipline and these restraints, the lawyer may have to renounce, if he has ever pretended to it, the dominance or rule of *lawyers* in international affairs, but he will establish something of far greater importance to himself and to the world—the Rule of Law.<sup>1</sup>

This is the philosophy that permeates Fitzmaurice's judgments. It is, of course, a philosophy that has been challenged<sup>2</sup> and its implications for particular cases can certainly be debated.<sup>3</sup> But if the contribution of law to human affairs depends upon its maintenance as a unique discipline, it is his exposition of that philosophy that will perhaps be regarded as Sir Gerald Fitzmaurice's most valuable contribution to the jurisprudence of the International Court.

<sup>1</sup> *Transactions of the Grotius Society*, 38 (1953), p. 149.

<sup>2</sup> See, for example, Higgins, *International and Comparative Law Quarterly*, 17 (1968), p. 58.

<sup>3</sup> For a discussion of the philosophical differences underlying the *Namibia* opinion, see Hevener, *International and Comparative Law Quarterly*, 24 (1975), p. 791.

# LEGALITY IN INTERNATIONAL ORGANIZATIONS\*

By FELICE MORGENSTERN<sup>1</sup>

THIS paper deals with only one group of international organizations, namely that variously referred to as the United Nations family or the United Nations system; it consists of the United Nations, the autonomous organizations (such as U.N.C.T.A.D., U.N.E.P., U.N.I.D.O., and U.N.H.C.R.) which have been established by the United Nations, the specialized agencies, and the International Atomic Energy Agency.

Further, this paper deals only with the public face of these organizations. It is not concerned with their private law relationships—their contracts, their ownership of property, etc. Nor is it concerned with the relationship between these organizations and their staff members. In those areas, while there may be particular problems of justiciability and of choice of law, the situation of international organizations does not differ very significantly from that of national governmental bodies. It is primarily the behaviour of the political bodies of the organizations which raises relatively novel issues of legality.

Legality presupposes the existence of binding law. That law exists in the form, first, of constitutions and other treaties which are the basis for the functioning of the organizations; these are often relatively short, are invariably established in more than one language, and are often not clear in any version. There are, secondly, the rules of procedure of the various organs and, in some cases, general rules of the organization; like most rules of this kind, national or international, they do not cover all the situations which arise, while often containing detail which, if applied to the letter, could be obstructive of the efficient dispatch of business. There are, thirdly, ancillary rules, such as Financial Regulations. And one must not forget the relationship agreements between the various organizations, which have a certain bearing on the definition of their respective competences.

As a system of law all this does not amount to very much; there is no accepted 'infrastructure' which would provide a frame of reference in cases to which the positive law does not provide an answer, or only a doubtful answer. There are a number of decisions of the International Court of Justice and of its predecessor; they are limited in scope, often cautious in terms, and rarely unanimous. There are, increasingly, precedents of action in one organization or another; they are not necessarily precedents which have won general acceptance. There is the logic of a number of specialized lawyers. There may be general principles

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of law, municipal law analogies, and the writings of publicists, but their world-wide acceptance is rare. It is in these circumstances that questions reflecting, if not always directly posing, the major political issues of the world have to be resolved.

It is proposed to examine, below, what some of the major questions of legality have been, and what are the implications of the manner in which they have been handled.

## I. QUESTIONS OF LEGALITY

### *Membership*<sup>1</sup>

All the organizations have constitutional provisions on membership. This is also an area in which illegality can cause direct hurt to a State. To some extent the potential consequences of such hurt have been mitigated, for instance by the establishment of the principle that a State admitted to membership in one organization in the United Nations system is entitled to U.N.D.P.-financed technical co-operation from the entire system. However, only membership provides access to the forum of the organization, and most States appear to attach importance to acquiring and retaining such access.

One of the first issues to arise after the Second World War was that of the legality of making admission to the United Nations subject to conditions other than those set out in the Charter. The International Court was divided on that issue, the majority holding that additional conditions were not legitimate. However, there was no divergency in the Court on the proposition that a substantial measure of discretion was left to the organs deciding on admission.<sup>2</sup> Except in so far as membership of the United Nations gives a quasi-automatic right to membership in other organizations, their Constitutions make this discretion even more clear.<sup>3</sup> Even a discretion should not be exercised arbitrarily; thus the Joint Dissenting Opinion in the case on the *Conditions of Admission to Membership in the United Nations* stressed the obligation to act in good faith and with a view to carrying out the purposes and principles of the United Nations. However, it is not easy to see by reference to what standards, in the present state of international law, the demonstration of an abuse of authority in admission to membership in an organization could be made.<sup>4</sup>

The League of Nations had the authority, under the Covenant, to declare that a State was no longer a Member, and exercised it once;<sup>5</sup> the case is perhaps best left to history. Since the Second World War no organization has used a

<sup>1</sup> See also under *The Powers and Functions of the Organization*, below, p. 250.

<sup>2</sup> See, e.g., *I.C.J. Reports*, 1948, pp. 64 (opinion of the Court) and 92 (joint dissenting opinion).

<sup>3</sup> For instance, Article I, paragraph 4, of the Constitution of the I.L.O. provides that 'The General Conference . . . may also admit . . .'; Article II, paragraph 2, of the Constitution of U.N.E.S.C.O. that 'States not Members of the United Nations may be admitted . . .'; Article II, paragraph 2, of the Constitution of F.A.O. that 'The Conference may . . . decide to admit . . .'.

<sup>4</sup> Quite apart from the evaluation of such specific conditions for admission as may exist, there is the problem of the recognition of States and Governments, which remains difficult to subject to any test of legality.

<sup>5</sup> Resolution of the Council of the League of 14 December 1939.



power of expulsion provided for in its Constitution.<sup>1</sup> Moreover, the question whether it is legally possible for an organization to expel in the absence of relevant constitutional provisions has not been formally put to the test.<sup>2</sup>

On the other hand, organizations have toyed, as a form of reprobation, with restrictions on the participation of certain Members in the work of the organization. In June 1963 the Governing Body of the I.L.O. decided to exclude South Africa from all meetings of the Organization the composition of which was determined by it.<sup>3</sup> While the subject of the decision was one in respect of which the Governing Body, under the relevant rules, enjoyed discretion, the Government of South Africa, in its letter of withdrawal from the Organization, described the decision, among others, as curtailing its basic rights as a Member.<sup>4</sup> In March 1965 the Executive Board of U.N.E.S.C.O. instructed the Director-General not to give effect to any invitations to Portugal<sup>5</sup> by virtue of decisions of the General Conference or of the Executive Board; in November 1966, the Conference decided to exclude Portugal from meetings and, overruling the opinion of the Legal Committee, rejected its request that the matter be referred to the International Court.<sup>6</sup> In 1968 the General Assembly of the United Nations was faced with the question whether its right to create subsidiary organs with limited membership enabled it to exclude South Africa from an organ—U.N.C.T.A.D.—with general membership. Legal advice was given that, while precedents were conflicting, such exclusion would not be in accordance with the provisions of the Charter, nor with the right of every member State to expect that its obligations will not be increased and that its rights will not be curtailed, except in the manner expressly laid down in the Charter.<sup>7</sup> All these cases related to the composition of bodies in which there were no constitutional rights of membership: some organizations—for example, U.P.U. and I.T.U.—have gone somewhat further and have excluded Members from participation respectively in their Congress and Plenipotentiary Conference.<sup>8</sup>

A related issue has been that of the use of credentials procedures to call in

<sup>1</sup> See, however, the consideration in the I.M.F. in 1954 of the circumstances in which a Member could be required to withdraw.

<sup>2</sup> In the I.L.O., adoption, in 1964, of amendments to the Constitution designed to provide a limited power to expel would seem to imply acceptance by the Conference of the view that, without such amendment, a power of expulsion did not exist. In 1974, without the constitutional amendments having come into force, a draft resolution to expel Portugal was submitted to the International Labour Conference by a number of African delegations; it was not considered in view of the political changes which had occurred in Portugal.

<sup>3</sup> *Minutes of the 156th Session of the Governing Body* (June 1963), pp. 13–26; the Government members of Canada, the United Kingdom, and the United States expressed doubts about the legality of the proposal.

<sup>4</sup> *Minutes of the 159th Session of the Governing Body* (June 1964), pp. 146–7.

<sup>5</sup> Portugal had become a Member of the Organization, in its capacity as a Member of the United Nations, when its policies in Africa were already under critical examination in U.N.E.S.C.O.

<sup>6</sup> Resolution 70/EX 14 of the Executive Board; *Report of the Legal Committee* (Doc. 14 C/90); *Records of the 14th Session of the Conference, Proceedings*, pp. 870–1005. The Legal Committee had been split on the question of the validity of the Executive Board's action.

<sup>7</sup> *United Nations Juridical Yearbook*, 1968, pp. 195–200.

<sup>8</sup> South Africa was excluded from the Congress of U.P.U. in 1964, and from the Plenipotentiary Conference of I.T.U. in 1965 and 1973; Portugal was also excluded from the last-mentioned.

question, not the fact that the authority issuing them is the sole, effective, and widely recognized Government of the country concerned, but the legitimacy of the basis of its authority. In 1958–9 the International Labour Conference invalidated the credentials of the delegates representing the Government of Hungary, essentially on the ground that that Government did not represent the people of the country. In 1958 the Chairman of the Credentials Committee, addressing himself to Government delegates whose countries recognized the Government in question, expressed the view that they were violating the recognized rules of international law and practice and that their action was tantamount to the temporary expulsion of a member State.<sup>1</sup> Also in that year the representative of the United Kingdom, supporting the invalidation, suggested that ‘very exceptionally, a case may arise where established practice and constitutional forms in these matters are transcended by moral considerations’;<sup>2</sup> in the following year, he spoke against following that course again, and urged the Organization to return to its established practice regarding Government credentials, i.e. to follow United Nations decisions.<sup>3</sup> The General Assembly of the United Nations, as from 1970, approved the report of its Credentials Committee ‘except with regard to the credentials of the representatives of South Africa’, essentially on the ground that that Government did not represent the majority of the people of the country. In 1970 the Legal Counsel of the United Nations advised the President of the Assembly that the rejection of credentials, where there was no question of rival Governments, ‘would have the effect of suspending a member State from the exercise of rights and privileges of membership in a manner not foreseen by the Charter. . . . The participation in meetings of the General Assembly is quite clearly one of the important rights and privileges of membership. Suspension of this right through the rejection of credentials . . . would . . . be contrary to the Charter.’<sup>4</sup> On that basis, the President of the Assembly ruled that the decision on credentials did not mean that the South African delegation was unseated. That ruling stood until 1974, when the Credentials Committee itself did not accept the South African credentials and the President of the Assembly considered it to be the will of the Assembly that the South African delegation should not participate in its work; he clearly distinguished that decision from expulsion, which would involve the intervention of the Security Council.<sup>5</sup>

### *The composition of organs*

Decisions of international organizations are taken through their organs. In so far as these organs are not composed of the entire membership, it is of importance that they be validly constituted.

The one case in which there has been a judicial finding—by a majority of the International Court—of constitutionally improper action by an international

<sup>1</sup> *Record of Proceedings of the 42nd Session of the International Labour Conference*, at pp. 493–4.

<sup>2</sup> *Ibid.*, p. 499.

<sup>3</sup> *Record of Proceedings of the 43rd Session of the International Labour Conference*, pp. 490–2.

<sup>4</sup> *Juridical Yearbook of the United Nations*, 1970, pp. 169–71.

<sup>5</sup> A/PV 2281, pp. 72–6. See the exhaustive analysis of this case by Ciobanu in *International and Comparative Law Quarterly*, 25 (1976), pp. 351–81.



organization concerned the composition of the Maritime Safety Committee of I.M.C.O.<sup>1</sup> In that case, the Court considered that the Constitution of the Organization required its Assembly to elect to the Committee eight States which were 'the largest ship-owning nations' and that it had omitted two of these. Constitutional amendments since that time, first as regards the Maritime Safety Committee and then as regards the Council, require the Assembly rather to elect a certain number from amongst States having the largest interest in shipping. Analogous constitutional provisions have been envisaged elsewhere. They inevitably raise the question how wide the electing organ may cast its net without violating the provisions at issue. Provisions of this nature are also open to a range of views concerning the manner of determining the States which are most important.<sup>2</sup> Again, therefore, there would appear to be a margin of discretion which would make it difficult in future to demonstrate that the constitutional provisions have not been observed.

Another, more technical, problem has been raised by the coming into force of constitutional amendments increasing the size of organs: pending the holding of new or of supplementary elections, are these organs capable of validly performing their functions? In 1965 the conclusion of the Office of Legal Affairs of the United Nations was that they were;<sup>3</sup> in fact, in that year both the Security Council and the Economic and Social Council held sessions in their original composition, and the General Assembly refrained from filling the additional seats until the normal elections, at the end of the year.<sup>4</sup> In 1973 the opinion of the Office of Legal Affairs was, again, that 'by-elections' were not necessary and, indeed, not appropriate;<sup>5</sup> this time, however, the General Assembly agreed by consensus that twenty-seven additional States should be empowered to serve at the session of the Economic and Social Council preceding the holding of normal elections<sup>6</sup>. Elsewhere, consideration has been given to the possibility of anticipated elections; use has not been made of it, because of the difficulty that those eligible to elect or be elected might not be the same at the time of the entry into force of the amendment.<sup>7</sup> The simplest manner of

<sup>1</sup> Advisory Opinion of 8 June 1960 on the *Constitution of the Maritime Safety Committee of I.M.C.O.* The case has been considered at length by E. Lauterpacht in his article on 'The Legal Effect of Illegal Acts of International Organizations', in *Cambridge Essays in International Law* (1965).

<sup>2</sup> In the I.L.O. the 'Members of chief industrial importance' which have permanent seats on the Governing Body are selected under a procedure which includes an impartial Committee of statistical experts. Some of the weightings used for different criteria have been criticized, but at various times different permutations have been shown to have substantially similar results. The procedure includes a right of appeal.

<sup>3</sup> *Juridical Yearbook of the United Nations*, 1965, pp. 224-5.

<sup>4</sup> See Schwelb, *American Journal of International Law*, 59 (1965), p. 850.

<sup>5</sup> *Juridical Yearbook of the United Nations*, 1973, pp. 149-51.

<sup>6</sup> See Schwelb, *American Journal of International Law*, 68 (1974), p. 302. There was no need to select the twenty-seven States in question as they had, pending the enlargement of the Council itself, participated in its sessional Committees.

<sup>7</sup> See, in particular, the consideration of this question at the 18th Session of the I.C.A.O. Assembly, in June 1971 (Document A18-WP/97, EX24, and *Report of the Executive Committee*). I.A.E.A. in 1961 skirted the difficulty by an informal invitation (*Annual Report of the Board of Governors*, 1 July 1961-30 June 1962, para. 8).



resolving the problem would, of course, be to specify expressly that the amendment takes effect only as from the date of the elections following the necessary number of ratifications; it is not certain that, where elections are relatively infrequent, this solution—which would exclude the possibility of earlier by-elections—would be politically acceptable.

The problem of the valid composition of organs may also arise where there are not enough candidates for vacant seats. An interesting example occurred early in the history of I.C.A.O. The Convention on International Civil Aviation provides, in Article 56, for an Air Navigation Commission of twelve members. At its Fifth Session in December 1948 the I.C.A.O. Council laid down the full terms of reference of the Commission, and called for nominations. At its Sixth Session it set up the Commission; however, since only nine persons had been nominated, the Council resolved that 'all contracting States be informed forthwith that on or after April 15th, 1949, the Council will proceed . . . to fill the three vacancies in the Commission, on the basis of further nominations which may have been received by that date . . .'.<sup>1</sup> The matter did not prove so easy to resolve; thus, in its report to the Assembly in May–June 1950, the Council indicated that 'no additional nominations were received, however, and, since the resignation of the representative of China on 17 April (1949), the Commission has functioned with a membership of eight'.<sup>2</sup> Other instances, of lesser dimensions, have occurred elsewhere; thus, when called upon in June 1975 to appoint twelve of its Government members to the Board of the International Centre for Advanced Technical and Vocational Training, the Governing Body of the International Labour Office noted that one seat remained vacant for a State of chief industrial importance.

### *The powers and functions of organs*

The distribution (often overlapping) of powers and functions between organs which are almost invariably differently composed, and frequently represent different balances of interests, is an essential feature of the conception of an organization by the authors of its constituent treaty. Like other elements of the constitution, the relevant provisions, generally couched in broad terms, have to stand the test of 'the unknown, the unforeseen and, indeed, the unforeseeable',<sup>3</sup> by reference to the effective achievement of the purposes of the organization.

As early as March 1950 the International Court was faced with a problem concerning the distribution of powers between the General Assembly and the Security Council of the United Nations. On the face of it the question was simple: the Charter provided for admission to membership to be effected by a decision of the General Assembly upon the recommendation of the Security Council; could the Assembly admit when the Security Council had made no

<sup>1</sup> I.C.A.O., *Proceedings of the Council*, Sixth Session, p. 18.

<sup>2</sup> I.C.A.O., *Report of the Council to the Assembly on the Activities of the Organization in 1949*, p. 75.

<sup>3</sup> Sir Percy Spender, Separate Opinion in the case of *Certain Expenses of the United Nations*, I.C.J. Reports, 1962, p. 185.

recommendation by reason of the candidate's failing to obtain the requisite majority or of the negative vote of a permanent Member? And simply the overwhelming majority of the Court answered it: 'to hold that the General Assembly has power to admit a State to membership in the absence of a recommendation of the Security Council would be to deprive the Security Council of an important power which has been entrusted to it by the Charter'.<sup>1</sup> However, in a dissenting opinion Judge Alvarez drew a distinction between cases in which the absence of a recommendation was due to the exercise of the veto and other cases. Basing himself on the view that even clear provisions of a treaty 'must receive appropriate interpretation when, as a result of modifications in international life, their application would lead to manifest injustice or to results contrary to the aims of the institution', he considered that the General Assembly could determine whether the right of veto had been abused, and, if it so concluded, proceed to admission.<sup>2</sup>

The problem of the respective functions of General Assembly and Security Council came before the Court again twelve years later in the case of *Certain Expenses of the United Nations*. It is not proposed here to go into the details of that very complex case, which has been analysed elsewhere.<sup>3</sup> It is sufficient to note, first, that many members of the Court accepted, with nuances, the principle that it was for each organ, in the first instance, to determine its own jurisdiction, and that there was a *prima facie* presumption of the validity of its decision. Secondly, there is, again, a dissenting opinion which is significant in the present context: Judge Bustamante alone attempted a detailed analysis of the legality of the various resolutions underlying the expenses at issue and indeed dissented because the Court had not done so; as regards the General Assembly action in the Middle East he considered it 'to have begun and continued by virtue of a case of *force majeure*, namely the impossibility acknowledged by the Security Council of carrying out its responsibilities in respect of a conflict to which two permanent Members were parties. . . . [I]t would seem that the Assembly's active intervention may be justified since the Organization was obliged to fulfil the principal purposes of its existence under Article 1 of the Charter'.<sup>4</sup>

The problem of the delimitation of functions and powers between organs, and the interpretation given, in that connection, to express provisions in a constituent instrument, is perhaps best illustrated by the practice of the United Nations as regards Article 12 of the Charter, which provides that, while the Security Council is exercising in respect of any dispute or situation the functions assigned to it by the Charter, the General Assembly shall not make any recommendation with respect to that dispute or situation unless the Security Council

<sup>1</sup> *Competence of the General Assembly for the Admission of a State to the United Nations*, I.C.J. Reports, 1950, p. 9.

<sup>2</sup> Ibid., pp. 17 and 20. In November 1950 the General Assembly 're'-appointed the Secretary-General after it proved impossible to obtain a recommendation of the Security Council on appointment.

<sup>3</sup> See, in particular, from the point of view of the problem of legality, E. Lauterpacht, 'The Legal Effect of Illegal Acts of International Organizations', *Cambridge Essays in International Law* (1965), at pp. 106-14.

<sup>4</sup> I.C.J. Reports, 1962, p. 293.



so requests. A detailed analysis of relevant practice prepared by the Office of Legal Affairs in 1964 showed that

the General Assembly, beginning in 1960, adopted several resolutions clearly containing recommendations in cases of which the Security Council was then seized and could reasonably be regarded as exercising its functions in regard to that question. Six such cases have been found in which the General Assembly appears to have departed from the actual text of Article 12. In none of these cases, however, did a Member object to the recommendation on the ground of Article 12. Although Article 12 has not been invoked in these cases, it would be difficult to maintain that it is legally no longer in effect. A Member may therefore argue in the General Assembly that Article 12 forbids the adoption of a recommendation in the case, and the point, if pressed, may have to be decided by the General Assembly.<sup>1</sup>

There are, in addition, cases in which powers or functions need to be exercised which were not expressly provided for in the Constitution. Whereas this is often done as a matter of course, by one organ or another, there have been cases in which the legality of the action being taken by a particular organ has been questioned. Two examples may be mentioned from the history of the I.L.O.

The first related to the participation of the United States, after its admission to the Organization in 1934, in the work of the Governing Body as a State of chief industrial importance. At that time the only constitutional provision on the subject gave the Council of the League of Nations the authority to decide disputes on the subject; there was no express provision on the routine determination of the States of chief industrial importance. It was argued by some that such determination could be made only by the Conference; in this connection, reliance was placed, on the (somewhat inconclusive) practice of the Organization up to that time, on the fact that it was the Conference which was responsible for the choice of elected members, and, above all, on the fact that it was the Conference which was representative of all member States. However, an opinion of the Legal Adviser of the International Labour Office took the view that, even if some degree of competence of the Conference might be justified on the last-mentioned ground, this was no reason for disputing the natural and primary competence of the Governing Body to determine the quality which carried with it a right to a seat on the Governing Body.<sup>2</sup> The Officers of the Governing Body concluded that the Governing Body was the competent authority to establish *de facto* changes in the list of Members of chief industrial importance, and the Governing Body endorsed that conclusion.<sup>3</sup>

The second related to the recognition of the Government of a member State. Traditionally, this question had arisen, and been dealt with, either as a matter of administrative routine for the office or as a credentials matter in the

<sup>1</sup> *United Nations Juridical Yearbook*, 1964, pp. 228–37. In advice to the Third Committee of the General Assembly on 12 December 1968 the Legal Counsel indicated that the practice was based on an interpretation of the words ‘is exercising’ as ‘is exercising at this moment’; the fact that a matter was on the agenda of the Security Council did not debar the Assembly: *ibid.*, 1968, p. 185.

<sup>2</sup> *Minutes of the Private Sitzings of the 69th Session of the Governing Body* (January–February 1935), p. 56.

<sup>3</sup> *Ibid.*, pp. 34 and 29.



International Labour Conference. Following recognition of the Government of the People's Republic of China by the General Assembly of the United Nations in October 1971, the Governing Body of the International Labour Office was seized of the question in November. It was again argued by some that the determination of the Government entitled to represent a member State could be made only by the Conference; some of the contentions put forward in support of that view were analogous to those made in 1935. Again the view prevailed that, without excluding a possible concurrent competence of the Conference, the Governing Body had authority to make such determination. An important consideration in that conclusion appears to have been that, outside sessions of the Conference, the Governing Body had the responsibility of ensuring the smooth functioning of the Organization, that this responsibility was limited only by express provisions reserving particular matters for determination by the Conference, and that failure to act would have resulted in the non-application of a policy accepted in the Organization—that in matters of this kind the I.L.O. should be guided by the central political organ of the international community—for a significant period of time. Some Members took the view that the decision was open to review by the Conference; the question was not, in fact, raised there.<sup>1</sup>

Reference should be made, finally, to cases in which the issue has not been so much the distribution of powers and functions between organs, but the characteristics of the organ accepted as entitled to exercise certain functions. Foremost amongst these cases are the problems which arose as a result of the exercise, by the General Assembly of the United Nations, of the functions with respect to mandates previously vested in the Council of the League. In the *Voting Procedure* case, the International Court of Justice, asked to determine whether in such case the Assembly (normally voting by a majority) would use the unanimity rule of the League Council, took the view that this would disregard one of the characteristics of the Assembly, voting systems being related to composition and functions.<sup>2</sup> In the *Namibia* case, the majority of the Court considered that the Assembly was entitled to exercise the same authority in respect of the territory as was possessed by the League and that its decisions and determinations in that respect had the same force and effect as the decisions and determinations of the Council of the League.<sup>3</sup> However, in a dissenting opinion Sir Gerald Fitzmaurice took the view that to invest the General Assembly with the power to take executive and peremptory action—even if the League Council had possessed it—would amount to disregard of one of its characteristics within the system of the Charter.<sup>4</sup>

### *The powers and functions of the organization*

This is the aspect of the subject here under consideration which has received most attention in the past. It is not proposed to enter into such questions as the

<sup>1</sup> The discussion may be found in *Minutes of the 184th Session of the Governing Body* (November 1971), pp. 7–36.

<sup>2</sup> *I.C.J. Reports*, 1955, at p. 75.

<sup>3</sup> *I.C.J. Reports*, 1971, at p. 61.

<sup>4</sup> *Ibid.*, p. 286.

extent to which the powers and functions of organizations are derived from their constitutions, a subject on which a great deal has already been written.<sup>1</sup> It is sufficient to note that no one has yet improved on the view of the International Court of Justice that 'when the Organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the [United Nations], the presumption is that such action is not *ultra vires* the Organization'.<sup>2</sup>

At the same time, practice in the matter, seen from a historical perspective, has some interesting features.

On the one hand, a relatively high number of specific issues of competence, including issues of implied powers, have gone to the Courts. The results have usually been positive. To cite only a few in which there was no express constitutional basis: In 1926, in the Advisory Opinion concerning the *Competence of the I.L.O. to regulate incidentally the personal work of the employer*, the Permanent Court considered that there was such a competence where it proved to be essential to the efficacious working of regulative measures for the protection of wage-earners.<sup>3</sup> In 1949, in the Advisory Opinion on *Reparation for Injuries Suffered in the Service of the United Nations*, the International Court of Justice recognized an implied power of the Organization to afford its agents the limited protection consisting in claiming, on their behalf, reparation for damage suffered in the exercise of functions. It regarded such protection necessary to the independence of the Organization's agents.<sup>4</sup> In 1954, in the Advisory Opinion on the *Effect of Awards of Compensation made by the United Nations Administrative Tribunal*, the Court held that the United Nations had the implied power to establish a tribunal to adjudicate upon disputes between itself and its staff, this being essential for the efficient working of the Secretariat.<sup>5</sup> While the position of principle was consistent, the incidence of litigation suggests that the issue of its application, i.e. of the legality of the exercise of specific powers, recurred again and again.

Conversely, there have been cases where a power about which serious doubts had been expressed by legal specialists was exercised in practice without a question being raised. A striking example of this was the admission of Members to the I.L.O. prior to 1946. Until that time, the Constitution expressly provided only for membership in virtue of membership in the League of Nations; no reference was made to the possibility of admitting States which were not Members of the League. When the question whether the legal status of Danzig enabled it to become a Member of the I.L.O. was submitted to the Permanent Court in 1930, the question of the power of the Organization to admit Members was not directly raised. The majority of the Court accordingly did not deal with it, although it noted in passing that it was not impossible that the intention of the

<sup>1</sup> See, in particular, Rama-Montaldo, this *Year Book*, 44 (1970), pp. 111-15, and Seyersted, *Objective International Personality of Intergovernmental Organizations* (1963).

<sup>2</sup> *Certain Expenses case*, *I.C.J. Reports*, 1962, p. 168.

<sup>3</sup> *P.C.I.J.*, Series B, No. 13 (1926).

<sup>4</sup> *I.C.J. Reports*, 1949, p. 174, particularly at p. 182.

<sup>5</sup> *I.C.J. Reports*, 1954, p. 47.



authors of the Treaty of Versailles had been that membership in the League and in the I.L.O. should coincide.<sup>1</sup> President Anzilotti, in a dissenting opinion which turned on the refusal of the Court to address itself to that question, had no doubt that this was indeed the intention.<sup>2</sup> Yet in 1934 the International Labour Conference unanimously approved the admission to the Organization of the United States, a non-Member of the League, without discussion of the legal issues, and did the same three years later as regards Egypt.<sup>3</sup>

Furthermore, with the multiplication of organizations, each having a specialized functional area of activity, it has become desirable—in the interest of States which are, overwhelmingly, Members of all of them—to deal with many matters jointly; and this may involve action by the organs of one organization admittedly going beyond the normal constitutional mandate of that organization. The legal aspects of this were considered on one of the first occasions of such action, namely the examination and adoption, by the International Labour Conference in 1956–7, of a Convention and a Recommendation on Indigenous and Tribal Populations which covered such matters as land ownership, health, and education.<sup>4</sup> Representatives of the other organizations concerned—the United Nations, F.A.O., W.H.O., and U.N.E.S.C.O.—affirmed the need for concerted action and the fact that the preparatory work had been a co-operative effort. The majority of delegates were agreed that the conditions of life and work of indigenous populations in independent countries had to be conceived as constituting an integral problem, which of necessity called for a broad and comprehensive approach. An amendment designed to exclude from the proposed instruments provisions relating to other than labour and social security matters was rejected by four votes in favour and sixty-four against, with eight abstentions. At the same time, emphasis was placed on the fact that such extension of jurisdiction as there was was not a unilateral act; it was essentially a feature of inter-organization collaboration.<sup>5, 6</sup>

### *Compliance with Rules of Procedure*

Rules of Procedure are the 'rules of the game'. It is normal, in games, for these rules not to be changed in the middle of a match. Nevertheless, by reference

<sup>1</sup> *International Labour Office, Official Bulletin*, vol. 15, No. 3 (September 1930), at p. 80.

<sup>2</sup> *Ibid.*, p. 88.

<sup>3</sup> As early as 1919 the Organization admitted Germany and Austria, not then Members of the League; there was, however, an express authorization of the Supreme Council of the Allied and Associated Powers.

<sup>4</sup> For a fuller examination of this particular case see G. I. Bennett, this *Year Book*, 46 (1972–3), pp. 382–92. For the more general problems of the co-ordination of the legislative activities of the different organizations in the United Nations family, see *Report of the Administrative Committee for Co-ordination to the Economic and Social Council of the United Nations for the years 1973–4* (E/5488, pp. 51–2).

<sup>5</sup> *Record of Proceedings of the 39th Session of the International Labour Conference* (1956), pp. 757–8, 530–46; *Record of Proceedings of the 40th Session of the International Labour Conference* (1957), pp. 722–4, 400–17.

<sup>6</sup> It might be noted that the authority to request advisory opinions of the International Court, given by the General Assembly of the United Nations to the specialized agencies through the relationship agreements, expressly excludes the mutual relationships between the various organizations.



in some degree to national parliamentary practice, the question has arisen from time to time to what extent the organs of international organizations are 'masters' of their procedure in the sense of being able to disregard them in particular cases.

The question can arise only in so far as the organ is the 'master' of the procedure in another sense, namely that of being empowered to adopt and amend the basic rules. Some rules are embodied in constitutional documents; they are clearly untouchable. Furthermore, there are bodies the rules of procedure of which are determined for them. For instance, the Standing Orders of the World Employment Conference held in June 1975 were established by the Governing Body of the International Labour Office. The view was strongly pressed by some that the accredited representatives of member States meeting in a conference had an inherent power to determine and alter rules of procedure. In practice, however, one particularly contentious point was reviewed by the Governing Body itself, whereas the Conference was scrupulous in the observance of its rules.

There is no doubt that most international organs take short cuts through their rules for purposes of convenience by general agreement. The real questions in this connection are whether a majority can take such short cuts against the express desire of a minority, and whether, in this connection, some rules are more important than others. Professor Conforti, in an examination of United Nations practice,<sup>1</sup> has concluded that the answer might be found in making a principle of impartiality and objectivity the test. While the application of such a test may not always be self-evident, it certainly represents a means of reconciling the needs of efficiency<sup>2</sup> and of justice.

In many cases it is not a question of meetings not complying with the rules; rather, these rules lend themselves to a variety of interpretations and combinations. In these circumstances, the presiding officer carries the burden of deciding which interpretation correctly serves the purpose of the rules. Here again there clearly is a responsibility for the protection of the rights of the minority. Thus in 1963 the International Labour Conference was faced with the question whether its President could withhold the right to speak from a South African delegate on the basis of his power to accord and withdraw that right and his responsibility to maintain order; the acting President ruled that the right of every accredited delegate to speak could not be denied<sup>3</sup>—despite the fact that this implied a considerable degree of disorder. There is, however, also the

<sup>1</sup> 'Non-compliance with U.N. Rules of Procedure', *American Journal of International Law*, 63 (1969), pp. 479–89.

<sup>2</sup> In 1975, the President of the International Labour Conference suspended a sitting although he had then before him a request for a record vote and legal advice that he was bound to take that vote. The following morning he explained that he had done so, by reference to the fact that the outcome of the vote would not have influenced the further proceedings on the item, in order to save the Conference a long evening; this was expressly accepted by the 'minority' (*Record of Proceedings of the 60th Session*, pp. 814–15 and 823).

<sup>3</sup> *Record of Proceedings of the 47th Session of the International Labour Conference*, pp. 143–5. A legal opinion affirming the right of delegates to take part in the discussion had been given earlier (*ibid.*, pp. 135–60).

corresponding problem of the extent to which a minority can take advantage of procedures to thwart the substantive will of a majority; in other words, is not the purpose of rules, in the ultimate resort, to ensure that a meeting arrives, after proper consideration, at conclusions correctly reflecting the intention of the majority?<sup>1</sup>

The views of the International Court of Justice, in the one case in which procedural irregularities of an international organization have been asserted before it, do not conflict with the foregoing considerations. Dealing, admittedly, with a quasi-judicial procedure, in the proceedings concerning the jurisdiction of the I.C.A.O. Council, the Court noted that the alleged irregularities did 'not prejudice, in any fundamental way, the requirements of a just procedure' and was content to consider, for the rest, that, if irregularities had occurred, they merely implied that the Council had reached the right conclusion in the wrong way.<sup>2</sup>

### *Compliance with general principles of law*

It has been suggested in recent years that international organizations have an obligation to comply with certain basic, generally accepted principles of law. In particular, it has been argued that they should not by resolution condemn particular States without giving these States a fair hearing and taking steps to have the relevant facts ascertained objectively. These are, as yet, relatively uncharted seas; there has not been any veritable discussion of the issue, and it has certainly not been the subject of judicial determination. The subject may be, but is not necessarily, linked to the question whether there exist procedures making it possible to arrive at conclusions on the basis of objective facts. Perhaps there is an underlying difficulty in that, in the relatively embryonic state of 'world government', there is no real division between quasi-legislative, quasi-executive, and quasi-judicial functions. Perhaps the most that can be said at this stage is that various organizations have indeed adopted texts which raise the issue of due process, but that, equally, most of them have endeavoured to have more or less objective fact-finding processes on the types of issues which have given rise to these texts.

## II. IMPLICATIONS

After a rapid review of the main questions of legality in international organizations it cannot be said that there are many cases of patent illegality. It can certainly be argued, and no doubt justified by legal reasoning, that one or other action referred to was illegal. However, there will in most cases be equally valid arguments that the relevant legal provisions lent themselves to an interpretation

<sup>1</sup> An example of this dilemma is given by the quorum rule in Committees of the International Labour Conference. A vote is not valid if a certain quorum is not attained. Where this happens, a record vote may be taken 'immediately'. Must this be applied literally late in the afternoon when it is clear that a quorum can no longer be obtained, or may the record vote be taken the following morning? On several occasions the ruling has been that it may be taken the following morning.

<sup>2</sup> *I.C.J. Reports*, 1972, p. 70.



permitting the action, or that it was otherwise justifiable by reference to overriding legal or moral considerations. In a situation in which there is relatively little positive law, and a great deal of that is deliberately couched in general terms, it would be surprising if the position were otherwise.

It has sometimes been alleged that this position is due, in particular, to the absence of possibilities of judicial review. That feature of the situation must not be exaggerated. First, as has been seen, a relatively substantial number of key questions has in fact reached the International Court. Admittedly it has done so in advisory proceedings, but that is no defect if the essential purpose is not to set aside a particular decision but to clarify the law; there is little indication of an intention to disregard, within the Organizations, the advice of the Court. Secondly, while it is true that there is not, in the United Nations, any possibility of contentious proceedings regarding the interpretation and application of the Charter—a gap which has led to recent consideration in the United States of the possibility of using the Optional Clause for that purpose<sup>1</sup>—such a possibility does exist in many of the specialized agencies.<sup>2</sup> Except for the *I.C.A.O.* case between India and Pakistan it has not been used. Why not?

Three reasons suggest themselves. The first, and least important, is that, while a decision of the Court may dispose of a particular case, the clarification of the law in a wider sense may not be very great; with very rare exceptions the advisory opinions of the Court relating to international organizations have been limited in practical scope and have not rallied the unanimity of the judges. Recourse to the Court would thus have to be worth while as regards the particular case. Here one comes to the second possible reason. Most of the actions of international organizations with regard to which questions of legality have arisen may have had political implications, but few have touched individual States where it hurts. In this connection it is significant that the treaties establishing the European Communities, unlike the Constitutions of the organizations of the United Nations family, do have provisions for the setting aside of illegal decisions; the Communities exercise powers which may touch the member State much more directly than those of a substantial number of the United Nations family organizations. And it is also significant that the one contentious case which was submitted to the Court—regarding the jurisdiction of the *I.C.A.O.* Council—related to a constituent instrument which does deal with matters affecting some vital State interests.

However, the most important reason why there has not been greater recourse to judicial interpretation probably is that such interpretation could inhibit, rather than advance, the growth of the law. The amendment of the constituent instruments of the various organizations, except for such matters as the enlargement of elected organs, is difficult;<sup>3</sup> if every issue of legality were submitted

<sup>1</sup> Sohn, *American Journal of International Law*, 69 (1975), pp. 852-4, and Ciobanu, *ibid.*, 70 (1976), pp. 328-89.

<sup>2</sup> See, for instance, Article 37 of the Constitution of the *I.L.O.*; Article 75 of the Constitution of *W.H.O.*; Article XIV of the Constitution of *U.N.E.S.C.O.*; etc.

<sup>3</sup> This does not apply to organizations such as *I.T.U.*, the basic treaty of which is regularly revised.



for judicial determination, there could be a risk of serious stultification.<sup>1</sup> As Professor Ciobanu puts it: 'The broad majority of Members of the United Nations . . . share the opinion of Judge Hudson that "no great international instrument could be completely self-explanatory, and meaning should be given to its provisions, not so much by the rulings of judges on the bench of the Court, as by the experience of those who have the responsibility of making the instrument work".'<sup>2</sup>

Does this mean that the law can grow from illegal acts? Hans Kelsen, in the introduction to *Recent Trends in the Law of the United Nations*, went very far in 1951 to affirm that this was so (and it is perhaps salutary to think back to those early days):

In the main work the author has frequently emphasised that the principle *ex injuria jus non oritur*—law cannot originate in an illegal act—has important exceptions. There are certainly cases where a new law originates in the violation of an old law. If and insofar as the organization of collective self-defence through the North Atlantic Treaty, the action in Korea, the re-appointment of the Secretary-General, and the resolution 'Uniting for Peace' are inconsistent with the old law of the United Nations, they, perhaps, constitute one of these cases of which we may say '*ex injuria jus oritur*'.

The apparently contrary view was stated in the Separate Opinion of Sir Percy Spender in the *Certain Expenses* case:

Nor can I agree with a view sometimes advanced that a common practice pursued by an organ of the United Nations, though *ultra vires* and in point having the result of amending the Charter, may nonetheless be effective as a criterion of interpretation.<sup>3</sup>

Both statements assume a demonstrated illegality. But in fact—and hence we come back to the starting-point—care is usually taken to bring actions within a possible interpretation of the law, which may thus gradually alter its original character, without violent breach of continuity.

The efforts to remain within the law are an essential, not an accessory, feature of the way in which issues which raise questions of legality are approached. The organized international community, like any other community, cannot live without law, and its members—all of them—are quite conscious of this. In any community, new or altered situations and problems raise questions as to the law applicable. In the organized international community, because of the relative paucity of positive law and because of the difficulty of formally altering or adding to that law, such questions may arise more frequently and cut more deeply. But their solution, as in other communities, usually involves a choice of possible rules or interpretations rather than a flouting of the law. The choice will

<sup>1</sup> For instance, if in 1934 the issue of the power of the I.L.O. to admit Members had gone to the Court, there would in all likelihood have been a negative opinion; the United States would then not have become a Member which might have affected the chances of the organization to survive the Second World War.

<sup>2</sup> Op. cit. (above, p. 254 n. 1), p. 338. See also Jennings, 'Nullity and Effectiveness in International Law', *Cambridge Essays in International Law* (1965), pp. 85–6, Jenks, *The Prospects of International Adjudication* (1964), at p. 107, and the very tentative nature of the resolution on Judicial Redress against the Decisions of International Organs, adopted by the Institute of International Law in 1957.

<sup>3</sup> *I.C.J. Reports*, 1962, p. 190.

be influenced by political factors, as indeed it often is in other communities; this, it has been suggested, is a reason why there is not more recourse to court decisions. But it is, none the less, a choice within the law.

The working of the system rests on acquiescence. There have been cases in which that acquiescence has been withheld—the refusal of one State or another to pay assessed dues, in respect of a particular expense<sup>1</sup> or in general,<sup>2</sup> and one or two withdrawals from membership.<sup>3</sup> As long as these are isolated phenomena, and even the minority on specific issues accepts and works within the changing pattern of the law as a whole, they do not seriously call in question the view that the process is a necessary one at the present stage of development of international organizations. If there ceased to be acquiescence, on a wider scale, the problem might become one, not of methods of applying and modifying the law, but of survival of organizations.

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There has been, in recent years, a resurgence of concern with the problem of legality. What is the reason for this and, in particular, is there any evidence of an increase in illegality? It would not seem that the nature of the question has altered substantially; what may have altered is the pace and the direction. There exists at the present time a positive will, in particular on the part of 'third world' States, to alter the law in a number of respects, and, while earlier changes arose rather from the need to deal with difficulties in the performance of the functions of the organizations, as they arose, change is now more consciously sought and created as a reflection of transformations in political balance.<sup>4</sup> It may be that this change of pace is also necessary: it echoes the concerns and pressures of the world outside the organizations. But it also magnifies the risk of the loss of acquiescence, and increases the dangers to the survival of universal organizations.

The ultimate question is how necessary universal organizations are to the States composing them. If they are, then—in the face of divisions of the world making agreement on new positive law difficult—issues of legality will go on arising, States will, essentially, go on acquiescing in the choices made, and so some law will grow. At the same time, it has to be recognized that the results of

<sup>1</sup> The refusal, *inter alia*, by the U.S.S.R. and France to pay the expenses of O.N.U.C. and U.N.E.F. was dealt with in the *Certain Expenses* case. Between 1971 and 1973 the U.S.S.R. refused to pay towards an I.L.O. subsidy to the International Centre for Advanced Technical and Vocational Training.

<sup>2</sup> For instance, the United States in the I.L.O. in 1970 and in U.N.E.S.C.O. in 1974.

<sup>3</sup> For instance, South Africa from the I.L.O. in 1966 (date of expiry of the two-year notice).

<sup>4</sup> One example of this conscious development of the law relates to the representation of colonial territories by their liberation movements. In 1960 the General Assembly of the United Nations adopted the Declaration on the Granting of Independence to Colonial Countries and Peoples, thus giving a new substance to Chapter XI of the Charter (see, on this, J. A. C. Gutteridge, *The United Nations in a Changing World* (1969)). In 1963 Portugal was excluded from the Economic Commission for Africa, thus posing the problem of the representation of Portuguese-administered territories in Africa. Legal advice in 1964 (Doc. E/3963) was that under international law these territories could be represented only by the administering authority. Yet by the 1970s the liberation movements of colonial territories in Africa became entitled to observer status, in representation of the territories, in virtually all organizations.

such a process are likely to be limited; it is not by this method that major transformations of this area of international law will be achieved. Hopes for a transition to more advanced forms of international government must rest in a future in which there is a greater degree of international understanding, and perhaps of community of interest, worldwide, than there is now.





# ULTRA VIRES ACTS IN INTERNATIONAL ORGANIZATIONS—THE EXPERIENCE OF THE INTERNATIONAL LABOUR ORGANIZATION\*

By EBERE OSIEKE<sup>1</sup>

## I. INTRODUCTION

THE rule of *ultra vires*, which operates to nullify acts of national governmental organs which do not conform to existing superior norms, has found a prominent and permanent place in the legal systems of many nations,<sup>2</sup> but remains a problematic and difficult question in international law.<sup>3</sup> For those who would like to see this question regulated by law in the international community, the present position may appear unsatisfactory, but when it is remembered that the evolution of rules of international law is based primarily on the consent of States, and that in most cases such consent is either difficult to obtain, or non-existent, the inevitability of the present situation may perhaps be appreciated. In any case, as has been pointed out by Professor R. Y. Jennings, 'questions of nullity and validity raise difficult and sophisticated problems even in highly developed systems of municipal law and it is therefore understandable if it is supposed that

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<sup>2</sup> For details of the operation of the doctrine of *ultra vires* in municipal law, see J. F. Garner, *Administrative Law*, 3rd edn. (1970), pp. 125-32; S. A. de Smith, *Constitutional and Administrative Law* (1973), pp. 564-73 and *Judicial Review of Administrative Action* (1973), pp. 82-3; Herman Finer, *The Theory and Practice of Modern Government*, vol. 1 (1932), p. 222; Sir Carleton Kemp Allen, *Law and Orders* (1945), p. 61; H. W. R. Wade, *Administrative Law* (1971), pp. 50-2; Griffith and Street, *Principles of Administrative Law* (1973), pp. 100-17; W. A. Wynes, *Legislative, Executive and Judicial Powers in Australia*, 3rd edn. (1962), p. 39; E. J. Crawford, 'The Legislative Status of an Unconstitutional Statute', *Michigan Law Review*, 49 (1951), pp. 645-66; R. Baxt, 'Is the Doctrine of Ultra Vires Dead?', *International and Comparative Law Quarterly*, 20 (1971), pp. 301-15; D. Denner, 'Judicial Review in Modern Constitutional Systems', *Administrative Political Science Review*, 46 (1932), pp. 1079-99; Oliver P. Field, 'The Effect of an Unconstitutional Statute', *Indiana Law Journal*, 1 (1926), pp. 1-17; H. W. R. Wade, 'Unlawful Administrative Action: Void or Voidable?', *Law Quarterly Review*, 83 (1967), pp. 499-526, and *ibid.*, 84 (1968), pp. 97-115.

<sup>3</sup> For a consideration of the question of nullity and invalidity in international law, see R. Y. Jennings, 'Nullity and Effectiveness in International Law', *Cambridge Essays in International Law* (1965), pp. 64-87; E. Lauterpacht, 'The Legal Effect of Illegal Acts of International Organizations', *ibid.*, pp. 88-121; J. E. S. Fawcett, '*Détournement de Pouvoir* by International Organizations', this *Year Book*, 33 (1957), pp. 311-16; C. F. Amerasinghe, *Studies in International Law* (1969), pp. 51-3; P. Guggenheim, 'La validité et la nullité des actes juridiques internationaux', *Recueil des cours*, 74 (1949-I); J. Verzijl, 'La validité et la nullité des actes juridiques internationaux', *Revue de droit international*, 9 (1935); P. Cahier, 'La nullité en droit international', *Revue générale de droit international public*, 76 (1972), pp. 645-97; Joël Rideau, *Juridictions internationales et contrôle du respect des traités constitutifs des organisations internationales* (Paris, 1969); Rapports de Wilhelm Wengler, *Annuaire de l'Institut de Droit International*, vol. 44-I (1952), vol. 45-I (1954), vol. 47-I, II (1957).

they are capable only of relatively crude application in the rough jurisprudence of nations'.<sup>1</sup> It may also be added that since the operation of the rule of *ultra vires* within the national State is dependent upon the exercise by specified organs of powers emanating from the Constitution or other superior norm, the absence of a single World Constitution or absolute universal norm, and a world government deriving its powers therefrom, could be a contributory factor to the dilatory development of rules of *ultra vires* in international law.

It should not, however, be assumed that the concept of *ultra vires* is of little concern to international lawyers. The proliferation of international organizations, which derive their powers from constitutions, has added new momentum to the problem and the concept of *ultra vires* has become as important in international law as it is in municipal systems of law.<sup>2</sup> This is apparent from the attention given in recent years by international courts and jurists to the subject, especially with respect to acts of international organizations.

The International Court of Justice had occasion to address itself to the problem in the course of its Advisory Opinion on *Certain Expenses of the United Nations* in 1962, where it stated that 'when the Organization takes action which warrants an assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organization'.<sup>3</sup> This view was subsequently affirmed by the Court in its Advisory Opinion of 21 June 1971 concerning the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* in the following terms:

A resolution of a properly constituted organ of the United Nations which is passed in accordance with that organ's rules of procedure and is declared by its President to have been so passed, must be presumed to have been validly adopted.<sup>4</sup>

While the point of view adopted by the International Court in these cases found support in the opinion of some individual judges, some others preferred a different approach. In his Separate Opinion in the *Certain Expenses* case, Judge Morelli, in sharing the views expressed by the Court, said that 'in the case of acts of international organizations, and in particular the acts of the United Nations, there is nothing comparable to the remedies existing in domestic law in connection with administrative acts. The consequence of this is that there is no possibility of applying the concept of voidability to the acts of the United Nations'.<sup>5</sup> . . . It must be supposed that the Charter confers finality on the Assembly's resolution irrespective of the reasons, whether they are correct or not, on which the resolution is based, and this must be so even in a field in which the Assembly does not have true discretionary power.<sup>6</sup>

<sup>1</sup> Jennings, 'Nullity and Effectiveness in International Law', loc. cit. (above, p. 259 n. 3), p. 64.

<sup>2</sup> Professor Jennings has indeed emphasized that as a result of the development of a law of international institutions the question of nullity and validity has become one 'that international lawyers can least afford to neglect': Jennings, loc. cit. (above, p. 259 n. 3), pp. 64-5.

<sup>3</sup> *I.C.J. Reports*, 1962, p. 168.

<sup>4</sup> *I.C.J. Reports*, 1971, p. 22.

<sup>5</sup> By implication this also means the 'acts of international organizations' since the 'United Nations' is one of such entities.

<sup>6</sup> *I.C.J. Reports*, 1962, p. 222; see also p. 225 and the Separate Opinion of Judge Sir Percy



On the other hand, in his Dissenting Opinion in the same case Judge Winiarski, President of the Court, stated:

In the international system, however, there is, in the absence of agreement to the contrary, no tribunal competent to make a finding of nullity. It is the State which regards itself as the injured party which itself rejects a legal instrument, vitiated, in its opinion, by such defects as to render it a nullity. . . .<sup>1</sup> A refusal to pay, as in the case before the Court, may be regarded by a member State, loyal and indeed devoted to the Organization, as the only means of protesting against a resolution of the majority which, in its opinion, disregards the true meaning of the Charter and adopts in connection with it a decision which is legally invalid.<sup>2</sup>

The divergences of opinion concerning the applicability of the rule of *ultra vires* to acts of international organizations appear to stem largely from the fact that the constitutions of most of these organizations do not contain provisions on the question. The first question which arises is whether international organizations possess the capacity to commit *ultra vires* acts<sup>3</sup> and if so, what consequences flow from such acts.

There appears to be a large measure of opinion in favour of the proposition that international organizations possess the capacity to commit *ultra vires* acts.<sup>4</sup> This view may find some support in the fact that the functions and powers of international organizations and their organs, as well as the procedure to be applied in the discharge of those functions or in the exercise of their powers, are

Spender, p. 183. In a written statement submitted to the Court in that case, the Government of Denmark asserted that 'it would be meaningless to maintain that action taken with the active support of an overwhelming majority of the member States in a situation of extreme gravity should be considered illegal': *Pleadings, Oral Arguments, Documents*, p. 162; see also statement made by Mr. O. Caoimh of Ireland, *ibid.*, p. 396.

<sup>1</sup> Judge Morelli did not agree with Judge Winiarski's proposition. In his Opinion, 'it is not possible to suppose that the Charter leaves it open to any State Member to claim at any time that an Assembly resolution authorizing a particular expense has never had any legal effect whatsoever, on the grounds that it was based on a wrong interpretation of the Charter or an incorrect ascertainment of situations of fact or law': *I.C.J. Reports*, 1962, p. 225.

<sup>2</sup> *I.C.J. Reports*, 1962, p. 232. Judges Fitzmaurice, Koretsky and Bustamante also made statements which appeared to support the view that the expenditure could only be that of the U.N. if the original Security Council and General Assembly resolutions were valid: *I.C.J. Reports*, 1962, pp. 253-87 and 288-308 respectively. See also the Memorandum of the Government of the U.S.S.R., which contained similar statements: *Pleadings, Oral Arguments, Documents*, p. 274. For an analysis of the Opinions of the various Judges in the *Certain Expenses* case, see E. Lauterpacht, *loc. cit.* (above, p. 259 n. 3), pp. 112-14; see also C. F. Amerasinghe, *Studies in International Law* (1969), p. 51. In his Dissenting Opinion in the *Namibia (South West Africa)* case, Judge Sir Gerald Fitzmaurice confirmed his views that the acts of the General Assembly could be *ultra vires* when he stated: 'in the result, the conclusion must be that the Assembly's act was *ultra vires* and hence that Resolution 2145 was invalid': *I.C.J. Reports*, 1971, p. 289.

<sup>3</sup> In an interesting article published in 1965, Mr. E. Lauterpacht stated that it would seem unrealistic to open the issue whether an international organization has the capacity to commit an illegal act since the analogous problem has long been resolved in relation to companies in municipal law: see Lauterpacht, 'The Legal Effects of Illegal Acts of International Organisations', *loc. cit.* (above, p. 259 n. 3), p. 88, footnote 1. While not challenging the suitability or in fact desirability of comparing international organizations with national companies, it would perhaps not be valid to assume that a solution applicable to national companies would automatically apply to international organizations, especially since the two entities do not possess the same characteristics.

<sup>4</sup> See the views of Judges Winiarski, Fitzmaurice, etc., above.

laid down in the constitutions of the organizations. It is therefore possible that in the fulfilment of their objects and purposes international organizations may undertake activities which are not expressly authorized in their constitutions, and they may adopt decisions in a manner which does not correspond entirely to the procedure laid down in their constitutive instruments.

In these circumstances, the question arises whether the acts concerned are illegal or unconstitutional. It seems apparent from the above that the answer to this difficult and complex question cannot be found by reference to any general principle or rule of international law, or to the constitutions of most organizations, and there is no consensus among international lawyers on the subject. However, since claims are often made that international organizations and their organs have not acted in conformity with the provisions of their constitutions, the practice of these organizations may be examined in order to establish how the claims have been resolved. Accordingly, the purpose of this paper is to undertake this examination with respect to the International Labour Organization.

## II. QUESTIONS OF *ULTRA VIRES* IN THE INTERNATIONAL LABOUR ORGANIZATION

The I.L.O. Constitution and the Standing Orders of the International Labour Conference and the Governing Body of the International Labour Office do not contain provisions on whether any acts of the Organization and its organs may be regarded as illegal or unconstitutional or on the procedure for determining any claims of illegality or unconstitutionality. Nevertheless, such claims have arisen from time to time over the course of the last fifty-seven years in both the Governing Body and the Conference.

### 1. *Claims arising in the Governing Body of the International Labour Office: the Chinese representation question*

The only question of significance concerning constitutionality of an act of the Governing Body of the International Labour Office arose in 1971 with respect to the representation of China in the International Labour Organization.

From 1950, the Credentials Committee of the International Labour Conference had had before it almost every year objections to the nomination of the Chinese delegation, but each time the Committee concluded that as the question was also before the United Nations Organization, it was not in a position to accept the objections until the decision of the United Nations had been made.<sup>1</sup>

On 25 October 1971, the General Assembly of the United Nations adopted by 76 votes to 35 with 17 abstentions a resolution<sup>2</sup> which, *inter alia*, recognized 'the representatives of the Government of the People's Republic of China as the

<sup>1</sup> See, for instance, *Record of Proceedings of the 40th Session of the International Labour Conference* (1957), p. 591.

<sup>2</sup> The text of this Resolution and Resolution 396 (V) of 14 December 1950 have been reproduced in I.L.O. Doc. GB.184/A/11, 184th Session (16-19 November 1971).



only representatives of China to the United Nations'. In communicating the text of this resolution to the International Labour Organization, the Secretary-General of the United Nations drew attention to General Assembly Resolution 396 (V) of 14 December 1950, which recommended, *inter alia*, that the attitude adopted by the General Assembly or its Interim Committee concerning the representation of a member State by the United Nations should be taken into account in other organs of the United Nations and in the specialized agencies.

As a result of this communication, the question of the representation of China in the International Labour Organization was added to the agenda of the 184th Session of the Governing Body of the International Labour Office.<sup>1</sup> During the debates at the plenary meeting of the Governing Body some delegates expressed the view that the Governing Body was not competent to take a decision on the matter. According to the Government member of the United States (Mr. Persons) it was important that the decision on the matter should be taken by the competent body, and the United States Government strongly held the view that that body was not the Governing Body but the Conference, to which the I.L.O. Constitution assigned responsibility for the approval of credentials. The United States Government felt that if it had been intended that other I.L.O. bodies should decide questions relating to credentials or to the representation of a member State the Constitution would have so provided, and that 'it would be a sad day in I.L.O. history if the Governing Body abandoned strict adherence to constitutional processes in attempting to decide the essentially political question now before it'.<sup>2</sup> The Government member of China (Mr. Cheng Pao-Nan) agreed that questions relating to membership should be dealt with exclusively by the General Conference, the supreme I.L.O. organ, and that the Governing Body—a body with fairly limited membership—would be seriously usurping the Conference's authority if, for reasons of political expediency, it set the extraordinary precedent of assuming the right to deal with such questions.<sup>3</sup> The foregoing views were largely shared by the Government member of Uruguay (Mr. Gros Espiell), who summarized the legal position as follows:

The Constitution appeared to contain no express provisions assigning competence in matters of state representation, and in the absence of such provisions it was necessary to accord implied competence to some I.L.O. body. It was well established in international legal jurisprudence, and confirmed in particular by an Advisory Opinion of the International Court of Justice, that the doctrine of implied competence could be applied to international organizations. Accordingly, there was no doubt but that the Organization was competent to decide which government should represent a member State. But which particular organ within the I.L.O. was competent? In view of the

<sup>1</sup> *Draft Minutes of the 184th Session of the Governing Body*, Doc. GB.184/PV (November 1971), p. I/1.

<sup>2</sup> Doc. GB.184/PV, 184th Session of the Governing Body (16–19 November 1971), pp. I/3–I/4. The Government member for the United States formally submitted a resolution that the matter should be referred to the 'next session of the General Conference of the International Labour Organization': see Doc. GB.184/A/11/D.2. The proposal was rejected by the Governing Body by 35 votes to 10, with 2 abstentions: *ibid.*, p. II/13.

<sup>3</sup> Doc. GB.184/PV, 184th Session of the Governing Body (16–19 November 1971), p. I/5.



capital importance of the question and of the need to consult all member States and all employers' and workers' representatives, the Uruguayan Government believed that the competent body was the most representative I.L.O. organ, namely the Conference.<sup>1</sup>

On the other hand, many of the members considered that the Governing Body was competent to take a decision on the matter. Speaking on behalf of the Governments of Denmark, Finland, Norway and Sweden, the Government member of Denmark (Mr. Coln) stated that since the Constitution did not expressly indicate which I.L.O. organ was competent to decide the question, and since that question was urgent, it seemed only reasonable that the Governing Body itself should take steps without delay to comply with the recommendation of the General Assembly of the United Nations. The Nordic countries were satisfied that it would not constitute any infringement of the Constitution for the Governing Body to decide the matter.<sup>2</sup> The Government member of France (Mr. Parodi) stated that the argument that the Governing Body was not competent to deal with the matter was based on a narrow interpretation of the I.L.O. Constitution. In any organization, there had to be a body competent to act in an emergency, and in the I.L.O. that was clearly the Governing Body, whose competence in the matter derived not only from the broad authority conferred on it by the Constitution but from the prestige it enjoyed within the Organization.<sup>3</sup> These views were supported by a majority of the Government members, the Employers' group,<sup>4</sup> and the Workers' group which in fact submitted a formal proposal '(1) that the Governing Body should take a decision on the matter now before it; (2) that the Governing Body decide to recognize the Government of the People's Republic of China as the representative Government of China'.<sup>5</sup> These proposals were subsequently adopted by the Governing Body.<sup>6</sup>

## 2. *Claims arising at the International Labour Conference*

It has very often been asserted either that the International Labour Organization has no competence to deal with a matter placed before the International Labour Conference and that the latter's acts would be unconstitutional; or that the acts of the Conference were contrary to the express provisions of the I.L.O. Constitution and the Standing Orders. Some of these claims will now be considered.

### (a) *Claims that the I.L.O. has no competence to deal with questions placed before the Conference*

(i) *The agricultural questions.* One of the claims that arose in this respect was concerned with the competence of the International Labour Organization to

<sup>1</sup> Doc. G.B.184/PV, 184th Session of the Governing Body (16–19 November 1971), p. II/2.

<sup>2</sup> Ibid., p. I/4.

<sup>3</sup> Ibid., p. I/3.

<sup>4</sup> For the statement of Mr. Bergenström, the Employers' spokesman, see *ibid.*, p. I/2.

<sup>5</sup> For the statement made by Mr. Morris, the spokesman for the Workers, see *ibid.*, p. I/1–I/2. The Workers' proposal is embodied in Doc. GB.184/A/11/D.1.

<sup>6</sup> By 35 votes to 10, with 3 abstentions, the Governing Body 'decided to take a decision now on the matter before it'; and by 36 votes to 3, with 8 abstentions, the Governing Body 'decided to recognize the Government of the People's Republic of China as the representative Government of China': see Doc. GB.184/PV, pp. II/13 and II/15 respectively.

deal with agricultural questions. During the Third Session of the Conference in 1921, the French Government raised an objection to the inclusion on the agenda of the Conference of items relating to the regulation of agricultural labour,<sup>1</sup> on the grounds, *inter alia*, that as the Constitution did not expressly authorize the Organization to deal with agricultural workers, the Conference had no competence to deal with these items. The Conference decided that it was competent to deal with the matter, and adopted Conventions and Recommendations on the subject.<sup>2</sup> Despite the decision of the Conference, the French Government maintained its objection and, on 13 January 1922, presented a motion to the Council of the League of Nations requesting it to ask the Permanent Court of International Justice for an Advisory Opinion on the matter. On 12 May 1922, the Council of the League of Nations requested the Court to give an Advisory Opinion on the following question:

Does the competence of the International Labour Organization extend to international regulation of the conditions of labour of persons employed in agriculture?

In an Advisory Opinion delivered on 12 August 1922,<sup>3</sup> the Court stated, *inter alia*, that Part XIII of the Treaty of Versailles—the Constitution of the I.L.O.—expressly declared that the design of the Contracting Parties was to establish a permanent labour organization, and that fact strongly militated against the argument that agriculture, which was the most ancient and the greatest industry in the world, employing more than half of the world's wage-earners, was to be considered as left outside the scope of the I.L.O., merely because it was not expressly mentioned by name. The Court concluded that it was unable to find in Part XIII of the Treaty, read as a whole, any ambiguity, and had no doubt that agricultural labour was included therein.<sup>4</sup> It therefore answered in the affirmative the question which was put to it.<sup>5</sup>

<sup>1</sup> Similar objections were made by the Swiss Peasants Union and the Swiss Federal Government in letters addressed to the International Labour Office dated 1 October 1920 and 7 January 1921 respectively. In its letter, the Swiss Government reserved its right to raise the question of the competence of the I.L.O. to deal with agricultural questions at the Conference, but only the French Government did so: see, generally, *Official Bulletin of the I.L.O.*, vol. 3 (January–June 1921), pp. 32–8.

<sup>2</sup> *Record of Proceedings of the 3rd Session of the International Labour Conference* (1921), p. 52. Also pp. 56–74, 77–88, 128–31.

<sup>3</sup> *Competence of the I.L.O. in regard to international regulation of the conditions of labour of persons employed in agriculture*, P.C.I.J., Series B, No. 2 (1922).

<sup>4</sup> *Ibid.*, p. 42.

<sup>5</sup> The principles established in this case were also applied by both the Conference and the P.C.I.J. in the case relating to the *Regulation of the work of the employer*. In 1925, the Conference adopted a Draft Convention which prohibited the night work of the employer in bakeries. The Employers' group maintained that the Organization had no competence to deal with the work of the employer, and requested that the P.C.I.J. be asked for an Advisory Opinion on the matter. This was done, and in its Opinion, the Court stated that the answer to the question depended upon the terms of Part XIII of the Treaty of Versailles—the Constitution of the I.L.O.—and after examining the Constitution concluded that the competence of the Organization was not limited to the work of the wage-earner, and that it could draw up and propose labour legislation which, in order to protect certain classes of workers, also regulated incidentally the same work when performed by the employer himself: P.C.I.J., Series B, No. 13 (1926).



In the meantime, on 13 June 1922, the French Government requested the Council of the League of Nations to ask the Court to give a further Advisory Opinion on the following question:<sup>1</sup>

Does the consideration of proposals concerning the organization and development of the means of agricultural production and of all other questions of the same nature lie within the competence of the International Labour Organization?

The request was duly transmitted to the Court,<sup>2</sup> and in an Advisory Opinion, of 12 August 1922,<sup>3</sup> the Court stated, *inter alia*, that the answer to the question depended entirely upon the construction to be given to Part XIII of the Treaty of Versailles from which alone the Organization derived its existence and its powers. In the opinion of the Court, the proper construction of that Part of the Treaty showed that the organization and development of the means of production in agriculture were not committed to the I.L.O.<sup>4</sup> However, in order to guard against too extensive an interpretation of its answer, the Court pointed out that it did not follow that the I.L.O. should totally exclude from its consideration the effect upon production of measures which it could seek to promote for the benefit of the workers; but that 'the consideration of methods of organizing and developing production from the economic point of view is in itself alien to the sphere of activity marked out for the I.L.O. by Part XIII of the Treaty of Versailles . . .'<sup>5</sup>

The views expressed by the Permanent Court of International Justice in these cases raise an interesting question as to what would amount to an unconstitutional act of the International Labour Organization. It would appear that the Court tried to draw a distinction between cases which fall within the objects and purposes of the I.L.O. and those that do not. In the former cases—and these appear to include questions relating to the regulation of the conditions of labour of persons employed in agriculture—it would not be unconstitutional for the I.L.O. to deal with the questions, even though they were not expressly referred to in the Constitution; whereas in the latter cases—and these appear to include the organization and development of the means of agricultural production—it would be unconstitutional for the Organization to deal with the questions.

If these statements have been correctly analysed, the presumption which manifests itself from the Opinions of the Court is that, where there is no express authorization or prohibition in the I.L.O. Constitution, acts of the Conference would be considered as unconstitutional if they related to matters which fell

<sup>1</sup> *P.C.I.J.*, Series B, No. 3 (1922).

<sup>2</sup> *Official Bulletin of the I.L.O.*, vol. 5 (1922), pp. 450-1.

<sup>3</sup> *Competence of the I.L.O. to examine proposals for organization and development of the methods of agricultural production*, *P.C.I.J.* Series B, No. 3 (1922). For an analysis of the Advisory Opinion of the Court in this case, see C. W. Jenks, 'La compétence de l'Organisation internationale du Travail', *Revue de droit international et de législation comparée*, 3 ième série, vol. 18 (1937), pp. 156-83; and G. Fischer, *Les rapports entre l'Organisation internationale du Travail et la Cour permanente de Justice internationale* ((Thesis) Geneva, 1945), pp. 319-48.

<sup>4</sup> *P.C.I.J.* Series B, No. 3, p. 58.

<sup>5</sup> *Ibid.*, p. 58.



outside the objects and purposes of the Organization. It would seem premature to regard the views of the Court as conclusive because in the next case to be considered it was claimed that the acts of the Conference were contrary to the objects and purposes of the I.L.O., and were consequently unconstitutional.

(ii) *The South African withdrawal question.* During the 45th Session of the Conference in 1961, the Nigerian Government delegate submitted a resolution to the Conference proposing that the Governing Body should be asked to advise the Republic of South Africa to withdraw from membership of the I.L.O.,<sup>1</sup> until such time as that Government abandoned its practice of apartheid which was against the declared principles embodied in the Constitution of the I.L.O.<sup>2</sup>

During the debate on the proposal in the Resolutions Committee of the Conference, the South African Government member stated, *inter alia*, that the introduction in the I.L.O. of purely political matters, unrelated to the Constitution of the Organization, was out of order, and that the terms of the resolution constituted a violation of the Constitution of the I.L.O.<sup>3</sup> He emphasized that his country was not the only Member which had not ratified all the Conventions adopted by the I.L.O., and that the Republic of South Africa had made great progress in furthering the ideals of the Organization. In conclusion, he stated that if the resolution was adopted by the Conference, the Republic of South Africa had no intention of acceding to the request contained therein, as to do so would be contrary to that State's policy of international co-operation.<sup>4</sup>

With the exception of the South African Government member, all the members of the Committee belonging to the three groups in the I.L.O.—Government, Employers and Workers—were unanimous in their condemnation of the policy of apartheid practised by the Government of the Republic of South Africa, but there were differences of opinion on the best measures to take in the context of the I.L.O. to give practical expression to the condemnation.

<sup>1</sup> *Record of Proceedings of the 45th Session of the International Labour Conference* (1961), Appendix IV, p. 79.

<sup>2</sup> While introducing the resolution in Committee, the Nigerian Federal Minister of Labour stated that the resolution was deliberately moderate in terms and confined itself to action which could be taken within the I.L.O. Any Member of the Organization was free to withdraw from the Organization if it could not comply with its aims and purposes, and the resolution merely requested the Governing Body to invite the Republic of South Africa to take the only course which remained open to it because of its policy of apartheid: *ibid.*, p. 79.

<sup>3</sup> It may be noted that the resolution did not seek to expel South Africa from membership of the I.L.O., but that the Governing Body should request the Government of that State to withdraw from the Organization. As it is permissible for a Member to withdraw in accordance with the provisions of Article 1 (5) of the I.L.O. Constitution, it may be argued that the resolution was not contrary to the Constitution. On the other hand, since the effect of the resolution would be to compel South Africa to withdraw from the I.L.O., probably against its will, it may also be argued that the effect of the resolution was to expel South Africa from membership of the I.L.O. and that, if it is unconstitutional to expel a State from the Organization, then the resolution was unconstitutional. On this question, see also Louis B. Sohn who has stated that 'even though disguised as an invitation to withdraw, such action is almost indistinguishable from a regular expulsion': 'Expulsion or forced withdrawal from an international organization', *Harvard Law Review*, 77 (1964), pp. 1381-1425, at p. 1416.

<sup>4</sup> *Record of Proceedings of the 45th Session of the International Labour Conference* (1961), Appendix IV, pp. 79-80.

Many of the members from the three groups were categorically in favour of the withdrawal of the Republic of South Africa from the I.L.O., stating that the policy of apartheid practised by the Government of that State was contrary to the principles and, consequently, the objects and purposes of the Constitution of the Organization.<sup>1</sup> They maintained that the continued membership of South Africa would be contrary to the interests of the Organization.

On the other hand, some members,<sup>2</sup> while pointing out that the deep-seated trend of the I.L.O. towards universality should not be forgotten, considered that as the Constitution of the Organization did not contain any provisions for the expulsion of a Member, the most effective action which the Conference could take would be to express condemnation in vigorous terms, leaving world public opinion to bring to bear upon the Government of the Republic of South Africa that moral pressure which could impose the only possible sanctions in the circumstances. These members pointed out also that if the resolution was adopted and the Government of the Republic of South Africa refused to withdraw, the result of the adoption of the resolution could only be a demonstration of the powerlessness of the I.L.O.<sup>3</sup>

After the debate, the Committee adopted a revised text of the resolution, and submitted it to the Conference for approval. During the debate in the plenary meeting of the Conference in which thirty-nine speakers took part, the views expressed in the Resolutions Committee were reiterated and developed. Thereafter, the resolution<sup>4</sup> calling for the withdrawal of the Republic of South Africa from membership of the I.L.O. on the grounds of the apartheid (racial discrimination) policy practised by the Government of the Republic, was adopted on a Recorded Vote by 163 votes in favour, 0 votes against, and 89 abstentions.<sup>5</sup>

Despite the adoption of the resolution, the Republic of South Africa continued to send delegates to the subsequent sessions of the Conference, and the delegates were admitted to the proceedings of the Conference. In 1964, the Conference adopted amendments to the Constitution of the I.L.O. authorizing itself, by two-thirds majority of the votes of the delegates attending the session including

<sup>1</sup> These included the members from Ghana, India, Dahomey, U.A.R., Ukraine, Yugoslavia, Congo (Brazzaville), Iraq, Mali, Poland, Bulgaria, U.S.S.R., Upper Volta, Morocco, Guinea, Liberia, Roumania, Indonesia and Cuba. The arguments put forward in support of the withdrawal of South Africa also included the following:

- i. although South Africa was one of the oldest members of the Organization, it had not only failed to conform with the ideals of the Organization, but had barefacedly violated them and refused to change its policy;
- ii. not one member of South Africa's delegation was drawn from the 13 million non-Whites whose labour had built up the economy of the country;
- iii. out of the 111 Conventions adopted by the I.L.O., only 8 had been ratified by South Africa, not including any of those dealing with fundamental human rights: *ibid.*, p. 80.

<sup>2</sup> These included members from U.S.A., Brazil, Italy, France, United Kingdom, Greece, Irish Republic, New Zealand, Japan and the Federal Republic of Germany.

<sup>3</sup> *Record of Proceedings of the 45th Session of the International Labour Conference* (1961), Appendix IV, pp. 80-1.

<sup>4</sup> For text of all the resolutions, see *Official Bulletin of the I.L.O.*, vol. 44 (1961), No. 1, pp. 16-41.

<sup>5</sup> *Record of Proceedings of the 45th Session of the International Labour Conference* (1961), pp. 614-16.



two-thirds of the Government delegates present and voting, to expel any Member of the I.L.O. which had been expelled by the United Nations, or to suspend from participation in the International Labour Conference any Member of the Organization which had been found guilty by the United Nations of pursuing a policy of racial discrimination.<sup>1</sup> On 11 March 1964, without waiting for the amendment to come into force, the Republic of South Africa gave notice of its withdrawal from the I.L.O.<sup>2</sup>

(iii) *The resolution on trade union freedoms in Israel, 1973.* This case also concerns a claim that the I.L.O. was not competent to deal with certain questions presented to the Conference, and that it was unconstitutional for the Conference to deal with them.

During the 58th Session of the Conference in 1973, some delegates presented to it a resolution concerning 'the policy of discrimination, racism and violation of trade union freedoms practised by the Israeli authorities in Palestine and the occupied territories'.<sup>3</sup> Among other things, the resolution condemned 'the policy of racial discrimination and violation of trade union freedoms . . . which the Israeli authorities are pursuing against the Arab peoples'; considered that 'occupation resulting from aggression constitutes in itself a continuing violation of basic human rights, and in particular of trade union rights and the right to work'; invited the Governing Body to set up a committee to investigate on the spot 'Israel's persistent violations of trade union freedoms and its discriminatory practices against Arab workers', and invited the Director-General to take immediate steps to put an end to 'these violations' and report to the Conference at its next session.

The resolution was referred to the Resolutions Committee for examination. While introducing the resolution in the Committee, the Employers' member for Iraq stated that Israel had been condemned on several occasions by the United Nations Commission on Human Rights for its action in the occupied territories, and that the I.L.O. should do likewise. Several members supported the resolution and spoke in favour of its adoption. The Government member for Tunisia stated that he was convinced that the I.L.O. would in no way be departing from its functions by adopting the resolution since the purpose of the Organization was to defend trade union rights throughout the world.<sup>4</sup> The Government member for Byelorussia S.S.R. described 'Israel's aggression against the peace-loving peoples' as a glaring violation of the United Nations Charter, of the basic principles of contemporary international law, and of the Constitution of the I.L.O.<sup>5</sup>

The Government member for Israel repudiated the resolution and the statements made in its favour. He stated that although the resolution was ostensibly aimed at bringing an investigation, its very title was an act of judgment. He concluded that if the authors of the resolution had been genuinely concerned

<sup>1</sup> *Official Bulletin of the I.L.O.*, Supplement 1 to No. 3, pp. 10-12; in accordance with the provisions of the Constitution of the I.L.O., the withdrawal became effective on 11 March 1966.

<sup>2</sup> *Yearbook of the United Nations*, 1966, p. 977.

<sup>3</sup> *Provisional Record of the 58th Session of the International Labour Conference* (1973), p. 30/11.

<sup>4</sup> *Ibid.*, p. 30/2.

<sup>5</sup> *Ibid.*, p. 30/5.



with the application of ratified Conventions, they would have raised the question in the proper committee.<sup>1</sup>

Many members also spoke against the resolution. The Government member for Belgium, speaking on behalf of the member States of the European Communities, stated that the resolution dealt with matters not within the competence of the I.L.O.; that the Organization's terms of reference did not cover questions falling within the competence of the Security Council of the United Nations; that the resolution did not conform to the requirements of Article 24 of the Constitution of the I.L.O. and the following articles, since it implied condemnation before investigation;<sup>2</sup> and that in view of the anti-constitutional character of the resolution, his Government would not be able to associate itself with its implementation by the I.L.O., if it was adopted by the Conference.<sup>3</sup>

The resolution was adopted by the Committee without an opposing vote,<sup>4</sup> but was not adopted by the Conference at its plenary sitting because of the absence of a quorum<sup>5</sup> when the vote was taken.<sup>6</sup>

(b) *Claims that acts of the Conference are contrary to the express provisions of the Constitution of the I.L.O.*

Claims that acts of the Conference are contrary to the express provisions of the Constitution, and therefore unconstitutional, have arisen a few times in the I.L.O., but it would suffice for present purposes to examine only one of these claims.

*The Hungarian delegation question, 1957-60.* One of the claims dealt with by the I.L.O. concerned the application of Article 3 of the Constitution which provides, *inter alia*, that:

The meetings of the General Conference of representatives of the Members shall be composed of four representatives of each of the Members, of whom two shall be

<sup>1</sup> *Provisional Record of the 58th Session of the International Labour Conference* (1973), p. 30/3.

<sup>2</sup> Article 24 of the I.L.O. Constitution authorizes an industrial association of employers or of workers to make a representation to the International Labour Office that any of the Members has failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party. Article 26 (1) authorizes a Member to submit a complaint against another Member under certain defined conditions and Article 26 (4) authorizes the Governing Body to adopt the same procedure either of its own motion, or on receipt of a complaint from a delegate to the Conference: for details of the application of these provisions, see Ebere Osieke, this *Year Book*, 47 (1974-5), pp. 324-38.

<sup>3</sup> *Provisional Record of the Proceedings of the 58th Session of the International Labour Conference* (1973), pp. 30/9-30/10.

<sup>4</sup> The vote on the resolution by show of hands was 6,671 in favour, 57 against, and 5,403 abstentions. The vote was challenged by the Government member for Israel, who asked for a Record Vote. The resolution was subsequently adopted on a Recorded Vote by 6,462 votes in favour, 0 votes against, and 5,586 abstentions.

<sup>5</sup> The votes on the Preamble were 167 in favour, 0 against and 121 abstentions: *ibid.*, p. 36/23. For a discussion of the quorum system operated by the Conference, see present writer's *The constitutional character of international organizations, with particular reference to the I.L.O., I.C.A.O. and I.M.F.* (an unpublished Ph.D. thesis submitted to the University of London, April 1974), pp. 60-6.

<sup>6</sup> A similar resolution which attracted more or less the same arguments was adopted by the Conference at its 59th Session, 1974, on a recorded vote by 224 in favour, 0 against, with 122 abstentions: see *Record of Proceedings of the 59th Session of the International Labour Conference*, pp. 414-27, 467-70, 477-8 and 808.

government delegates and the other two shall be delegates representing respectively the employers and work people of each of the Members. . . .

The Credentials of the delegates and their advisers shall be subject to scrutiny by the Conference which may by two-thirds of the votes cast by the delegates present, refuse to admit any delegate or adviser whom it deems not to have been nominated in accordance with the foregoing provisions . . .

During the 42nd Session of the Conference in 1958, an objection concerning the nomination of the Government delegation of Hungary was submitted by the Employers' delegates of France, Japan, the United Kingdom, the United States and Uruguay, on the grounds, *inter alia*, that there was not at that time in Hungary a Government elected or supported by the citizens of that country; that, by the armed intervention of the Union of Soviet Socialist Republics, the citizens of Hungary were denied the possibility of freely electing their representatives and of choosing their Government; that power had been usurped with the aid of the armies of the U.S.S.R.; and that all individual and collective liberties had been superseded.<sup>1</sup> In conclusion, the authors of the proposal stated that, as a result of the state of affairs which existed in Hungary, the conditions which should exist for the appointment of delegates and advisers to the Conference were not fulfilled since the delegates and advisers were appointed by an illegal government, and received their instructions from 'another government' rather than from the legitimate Government of Hungary.<sup>2</sup>

The objection was submitted to the Credentials Committee of the Conference and the majority of the Committee recommended that the Conference should refuse to admit the delegates and advisers.<sup>3</sup>

One group<sup>4</sup> maintained that in Hungary there did not exist any government in the sense of the Constitution of the I.L.O. which could be represented at the Conference by its own delegates and advisers, and also appoint Workers' and Employers' delegates, because the Government which claimed to represent Hungary had been imposed on the Hungarian people by the foreign military

<sup>1</sup> *Record of Proceedings of the 42nd Session of the International Labour Conference* (1958), p. 579. A similar objection was lodged in 1957 by four Employers' delegates to the 40th Session of the Conference against the nomination of the Government delegation of Hungary, but the objection was rejected: see *Record of Proceedings of the 40th Session of the International Labour Conference* (1957), pp. 591-2.

<sup>2</sup> *Record of Proceedings of the 42nd Session of the International Labour Conference* (1958), pp. 493-4.

<sup>3</sup> The majority report of the Credentials Committee, signed by Messrs. Fennema and Sanchez Madariaga, considered that to admit the delegates and advisers appointed by the Government of Hungary, which was imposed on the people of that State by a massive armed intervention of another State, would amount to a betrayal of the Hungarian people and the fundamental principles of the I.L.O.: *ibid.*, pp. 494-5.

On the other hand, in his minority report, Mr. Justice Berinson, Government delegate of Israel, stated that the Government of Hungary was at least a *de facto* Government of that country, and that to reject the Credentials of its delegates was tantamount to a temporary expulsion of Hungary from membership of the I.L.O. He therefore recommended that the Conference should not take a decision on the matter, as the question was also before the United Nations, until the latter had taken a firm line on the issue: *ibid.*, pp. 493-4.

<sup>4</sup> These included delegates from the United Kingdom, Netherlands, U.S.A., Philippines, Norway, Canada, Sweden, China and Italy.



intervention of a foreign government, in flagrant violation of the sovereignty of the people. In the opinion of these delegates, the persecution and execution of the innocent citizens of Hungary were contrary to the principles of humanity and fundamental freedoms, and if the Conference did not refuse to admit the delegates and advisers from Hungary, it would be giving approval to the activities of that Government.<sup>1</sup>

On the other hand, another group of delegates<sup>2</sup> considered that there was no doubt that both *de jure* and *de facto* the representatives of Hungary were the only lawful representatives of the People's Republic of Hungary. That was the Government which received the invitation to send delegates to the Conference and the invitation was sent to it because there was no other Government in Hungary. That Government had, in the last two years, ratified fourteen Conventions, and its activities had been noted with satisfaction by the Conference. That Government had given instructions for many thousands of dollars to be paid as its contributions to the I.L.O. both in 1957 and 1958 and the sums were received and accepted by the Organization. In the opinion of these delegates, there was nothing in the Constitution of the I.L.O. or in the Standing Orders of the Conference, or in any other legal document covering any international organization, which authorized the Conference to express an opinion, to discuss, or to take any valid decision on the nature of the Government of any Member and, therefore, the Conference could not 'legally refuse' to admit the delegates and advisers appointed by the 'legal Government' of Hungary.<sup>3</sup>

After a very lengthy debate in the plenary meeting, the proposal was adopted on a Recorded Vote<sup>4</sup> by 142 in favour, 48 against, and 29 abstentions. Thus the Conference refused to admit the delegates and advisers appointed by the Government of Hungary.<sup>5</sup> The delegates appointed by the same Government were also refused admission into the 43rd Session of the Conference in 1959,<sup>6</sup> but during its 44th Session in 1960 the Conference decided not to take any decision

<sup>1</sup> *Record of Proceedings of the 42nd Session of the International Labour Conference* (1958), pp. 493-530. The general feeling in this group appears to be manifest in the following statement made by Sir Guildhaume Myrddin-Evans (Government delegate, United Kingdom): 'My Government does not wish to deal with questions of credentials in this way and we would not normally do so . . . But, very exceptionally, a case may arise where established practice and constitutional forms in these matters are transcended by moral considerations. This is such a case and on this occasion we must take the only way now open to us of showing that we too share the feelings of others at a crime which has shocked and horrified the civilised world': *ibid.*, p. 499.

<sup>2</sup> These included delegates from Yugoslavia, U.S.S.R., Roumania, Byelorussia, Albania, Czechoslovakia, Ukraine, United Arab Republic, Poland and Pakistan.

<sup>3</sup> *Record of Proceedings of the 42nd Session of the International Labour Conference* (1958), pp. 493-530.

<sup>4</sup> Before the vote, the President announced that if there were a two-thirds majority of affirmative votes in favour of the proposal, the credentials of the delegates and advisers appointed by the Hungarian Government would be invalidated, but if there were no such majority of affirmative votes, the Conference would merely take note of the report of the Credentials Committee: *ibid.*, p. 508.

<sup>5</sup> *Record of Proceedings of the 42nd Session of the International Labour Conference* (1958), report of the Credentials Committee, Appendix II, p. 579; debate in plenary meetings, *ibid.*, pp. 493-530; Record of Votes, *ibid.*, pp. 508-9; and pp. 521-2.

<sup>6</sup> *Record of Proceedings of the 43rd Session of the International Labour Conference* (1959), p. 515, p. 530, pp. 501-5.



regarding the credentials of the Hungarian delegates and, consequently, admitted them into its proceedings.<sup>1</sup>

The proceedings in this case give rise to some interesting points. The decision of the Conference appears to establish the principle that a government which is imposed on the peoples of a Member of the I.L.O. by the armed intervention of another State is not the 'Government' which can appoint delegates and advisers to represent such Member in accordance with the provisions of Article 3 of the Constitution of the Organization. If such a principle is accepted, it will involve a determination of the legality or illegality of the Government of a Member of the I.L.O., and it may be wondered whether the Organization is properly equipped to determine such questions. In any case, it seems clear from the debates that in the opinion of several delegates such a principle could not be applied to the Hungarian Delegation case without some inconsistency on the basis of the undisputed facts of the case. It was difficult to regard the Government of Hungary as the 'Government' of that Member for the purposes of ratifying the Conventions adopted by the I.L.O., and the payment of the financial contributions of the People's Republic of Hungary, and not consider it as the 'Government' of Hungary for the purpose of appointing delegates to the Conference. It would have been more consistent to regard, or disregard, as the case may be, the Government as the 'Government of Hungary' for all purposes under the Constitution of the I.L.O.

### III. GENERAL PRINCIPLES WHICH EMERGE WITH RESPECT TO CLAIMS OF UNCONSTITUTIONALITY IN THE I.L.O.

Some very interesting principles seem to emerge from the foregoing examination of the practice of the International Labour Organization in the determination of claims of illegality or unconstitutionality concerning the acts of its organs. It would seem appropriate to consider these matters at this stage.

#### 1. *Claims of unconstitutionality*

In all the cases so far examined, the claim that it would be unconstitutional for an organ to adopt certain decisions was made by members of the Governing Body, or delegates to the Conference as the case may be. This seems to indicate very clearly that a claim of unconstitutionality can be made by the Government of a member State, or by the representatives of Employers' and Workers' organizations attending meetings of the organs of the International Labour Organization.

There appears to be nothing unusual in this practice. Since the acts of an international organization may have a direct effect on the Members, it is right that such Members should protest through their representatives against the acts of an organization and/or its organs which they consider to be incompatible

<sup>1</sup> *Record of Proceedings of the 44th Session of the International Labour Conference* (1960), p. 176; see also pp. 153, 170, 565.

with the objects and purposes of the Organization, or contrary to the express provisions of its Constitution.

## 2. *Determination of claims of unconstitutionality*

The fact which emerges from the present study is that all the claims of unconstitutionality were decided by the organs whose acts were challenged. This appears to be the position in international organizations generally, and is evident from the following statement made by the International Court of Justice in the course of its Advisory Opinion in the *Certain Expenses* case, 1962:

In the legal systems of States, there is often some procedure for determining the validity of even a legislative or governmental act, but no analogous procedure is to be found in the structure of the United Nations. Proposals made during the drafting of the Charter to place the ultimate authority to interpret the Charter in the International Court of Justice were not accepted;<sup>1</sup> the opinion which the Court is in course of rendering is an advisory opinion. As anticipated in 1945, therefore, each organ must, in the first place at least, determine its own jurisdiction.<sup>2</sup>

The fact that the organs of international organizations determine claims against their jurisdiction has raised the question whether these organs are acting as 'judges in their own causes' and whether they are indeed competent to make legal determinations. According to Sir Gerald Fitzmaurice in his Dissenting Opinion in the *Namibia (South West Africa)* case:

In the institutional field, the justification for the act of some organ or body may turn upon considerations of a political or technical character, or of professional conduct or discipline, and if so, the political, technical or professional organ or body concerned will, in principle, be competent to make the necessary determinations. But where the matter turns, and turns exclusively, on considerations of a legal character, a political organ, even if it is competent to take any resulting action is not itself competent to make the necessary legal determinations on which the justification for such action must rest. This can only be done by a legal organ competent to make such determinations.<sup>3</sup>

Several suggestions have been made on how the present position could be improved. In his Dissenting Opinion in the case referred to above, Sir Gerald Fitzmaurice alluded to the possibility of legal problems being referred to a 'competent legal organ or even to an *ad hoc* body of jurists (such as was the settled practice of the League Council in all important cases)'.<sup>4</sup> In a more recent article, Professor Louis B. Sohn made more concrete proposals on the subject:

The major issue is to make certain that grave objections to the constitutionality or legality of various decisions are properly considered and are not disposed of by the same body whose powers are in question. Thus, if a group of, for instance, 15 States should object to a proposed decision of the General Assembly on the ground that it constitutes a violation of the Charter of the United Nations, such objection should

<sup>1</sup> For the proposals made in this respect by the Belgian Delegation, see Doc. 2, G/7(k) (1), Docs. 336, 3 UNCIO (1945). For a further discussion on this point, see Dan Ciobanu, *American Journal of International Law*, 70 (1976), pp. 328-338, especially pp. 329-31.

<sup>2</sup> *I.C.J. Reports*, 1962, p. 168.

<sup>3</sup> *I.C.J. Reports*, 1971, p. 298.

<sup>4</sup> *I.C.J. Reports*, 1971, p. 300.



be referred by the General Assembly to some other body for a preliminary decision. As a minimum, the Legal Counsel of the United Nations, the head of the office of the Legal Affairs in U.N. Secretariat, should be requested to present a statement of relevant precedents and his views on their applicability to the case in question. Whenever possible such a question should be referred to the International Court of Justice for an advisory opinion. Should there be need for a speedy action a special committee of eminent jurists might be asked for guidance.<sup>1</sup>

There is no doubt that the foregoing suggestions would go a long way towards making the position more satisfactory, but it must be pointed out that a possibility does exist at the present time for international organizations to request the International Court of Justice for an advisory opinion on legal questions.<sup>2</sup> What is perhaps required in this respect is that greater effort should be made to refer more cases to the Court and a means should be devised to give binding force to the opinions of the Court in these cases.<sup>3</sup>

#### IV. LEGAL EFFECTS OF ACTS OF I.L.O. ORGANS WHICH ARE NOT IN CONFORMITY WITH THE CONSTITUTION AND/OR STANDING ORDERS

The fact which has emerged in the present study is that none of the acts adopted by the organs of the I.L.O. has been declared to be illegal or unconstitutional. However, since there is a possibility that certain acts of the organs may not conform to the Constitution and/or Standing Orders, it seems appropriate to consider the legal effects of such acts. Different considerations will apply with respect to the Governing Body and the International Labour Conference.

<sup>1</sup> *American Journal of International Law*, 69 (1975), p. 621.

<sup>2</sup> See Article 96 of the Charter of the United Nations.

<sup>3</sup> In a recent article, Dr. G. D. S. Taylor stated that 'it seems to be accepted that the I.C.J. will intervene against abuses of discretion by international organizations, though not those by the General Assembly and the Security Council which can be reviewed only for incompetence': this *Year Book*, 46 (1972-3), p. 325. This statement may be misleading since it implies that the Court has a general power to review the activities of international organizations. The position, as is evident from the present study, is that the Court may be asked for an Advisory Opinion on any legal question relating to the acts of international organizations, and the pronouncements of the Court, being advisory in nature, are not automatically binding either on the organizations or the Members. These observations may find some support in the statement of the Court: 'It was argued that the Court should not assume powers of judicial review of the action taken by the other principal organs of the United Nations without specific request to that effect, nor act as a court of appeal from their decisions. Undoubtedly, the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned. However, in the exercise of its judicial function and since objections have been advanced, the Court, in the course of its reasoning, will consider these objections before determining any legal consequences arising from those resolutions: Advisory Opinion on *Namibia (South West Africa)*, *I.C.J. Reports*, 1971, p. 45. On the binding effect of Advisory Opinions of the Court, see further D. W. Bowett, *The Law of International Institutions* (3rd edition, 1975), pp. 248-50; Sir Francis Vallat, 'The Competence of the U.N. General Assembly, *Recueil des cours*, 97 (1959-II), pp. 203-91. See also Ebere Osieke, *The constitutional character of international organizations* (above, p. 270 n. 5), p. 126.



1. *Acts of the Governing Body which are not in conformity with the Constitution and Standing Orders*

The powers and functions of the Governing Body are laid down in the I.L.O. Constitution and the Standing Orders of the Governing Body. Most of these functions are not subject to review, approval or confirmation by the International Labour Conference or any other body. In other words, the Governing Body retains final competence in the discharge of such functions. If it is claimed that the Governing Body has acted in an illegal or unconstitutional manner in the discharge of these functions, the matter will be decided by the Governing Body, without a right of appeal to any other body. Thus, if the Governing Body decides that it has not acted in an unconstitutional manner, then the decisions concerned will be binding on the organs and Members of the I.L.O. to the extent prescribed in the I.L.O. Constitution or the relevant instrument.<sup>1</sup> If it decides that it has acted in an unconstitutional manner,<sup>2</sup> it would appear that the acts concerned will not give rise to binding obligations, from the date that decision is made.<sup>3</sup>

On the other hand, different considerations would seem to apply to the activities of the Governing Body which are subject to review, approval or confirmation by the Conference. Some of these activities may be mentioned. Article 7 (3) of the I.L.O. Constitution, which authorizes the Governing Body to determine which are the Members of the Organization of chief industrial importance, also grants a right to Members to appeal to the Conference against the declaration of the Governing Body; Article 7 (6) of the I.L.O. Constitution provides that the method of filling vacancies and of appointing substitutes and other similar questions may be decided by the Governing Body subject to the approval of the Conference; and Article 38 provides that the powers, functions and procedure of regional conferences shall be governed by rules drawn up by the Governing Body and submitted to the General Conference for confirmation.

It is apparent that in the foregoing cases the Conference possesses the power to reject the acts of the Governing Body on the grounds that they were not adopted in conformity with the provisions of the I.L.O. Constitution. If that happens, the question will arise as to the legal effects, if any, of the acts concerned. The I.L.O. Constitution contains some guidance on the matter. Article 7 (3) provides that an appeal to the Conference against the declaration of the Governing Body under that article 'shall not suspend the application of the declaration until such time as the Conference decides the appeal.' This means

<sup>1</sup> On the possibility of a request to the I.C.J. for an Advisory Opinion, see the examination with respect to the Conference, below, p. 277.

<sup>2</sup> It must be pointed out that the situation here is based on hypothesis, since claims of illegality and unconstitutionality normally arise at the time a proposal is presented to, and before its adoption by, the Governing Body.

<sup>3</sup> The acts adopted by the Governing Body would have full legal force until challenged and would cease to give rise to binding obligations after the decision of the Governing Body that the acts are unconstitutional.

that the decision of the Governing Body will have full binding force, until reversed by the Conference, as a result of an appeal from a Member of the International Labour Organization. The provisions also imply that the declaration of the Governing Body will not give rise to binding obligations with effect from the date of its invalidation by the Conference.

With respect to decisions which require approval or confirmation by the Conference, it may be assumed that in the absence of constitutional provisions on the matter, such decisions will not give rise to binding obligations for the Members of the Organization until they have been approved or confirmed, as the case may be.

## 2. *Acts of the International Labour Conference which are not in conformity with the Constitution and Standing Orders*

The I.L.O. Constitution does not authorize Members to appeal against any decision of the International Labour Conference to any organ within or outside the Organization. The fact that the Conference is not responsible to any other organ in the discharge of its functions means that the right to appeal against its decisions cannot be implied from its character. Thus, since the Conference is the final arbiter in all matters concerning its competence and jurisdiction, the question arises whether its acts can ever be unconstitutional.

It has been seen from the practice of the Organization that in cases where a Member considered that the acts of the Conference were unconstitutional, it requested that the Permanent Court of International Justice should be asked for an Advisory Opinion on the matter. This suggests that resort to the Court is one of the means for determining whether the acts of the Conference are unconstitutional.

The Court may find that such acts are not authorized by the express provisions of the Constitution of the I.L.O.; or that they fall outside the objects and purposes of the Organization; or that they are contrary to the express provisions of the Constitution. But so far as these findings are embodied in an Advisory Opinion, they are not, *ipso facto*, binding on the Conference.<sup>1</sup> This means that although the International Court of Justice may declare that the acts of the Conference are 'unconstitutional', the declaration will not as such have the effect of invalidating such acts.

A claim that the acts adopted by the Conference are 'unconstitutional' may revolve on the interpretation of the articles of the Constitution of the I.L.O. upon which such acts are based. In such circumstances, the claim may constitute a 'question' or 'dispute' relating to the interpretation of the relevant provisions of the Constitution, and may be referred to the International Court of Justice for decision by virtue of the provisions of Article 37 (1) of the Constitution of the I.L.O. Here again, if the 'question' or 'dispute' is referred to the Court by any of the organs of the I.L.O., it will be in the form of a request for an Advisory

<sup>1</sup> See p. 275 n. 3 above.

Opinion, because the organ will not have *locus standi* to appear before the Court, and as has been pointed out, an Advisory Opinion of the Court is not automatically binding on the Conference. If the 'question' or dispute' is referred to the Court by the Members of the I.L.O. in the form of a contentious case—this assumes that the States are divided in favour of and against the adoption of the acts by the Conference—the decision of the Court will be binding on the Members concerned,<sup>1</sup> rather than the Conference. This means also that even if the Court decides that the acts of the Conference are 'unconstitutional', the decision will not have the effect of invalidating them.

As no organ within or outside the I.L.O. appears to be competent to invalidate the acts of the Conference which are claimed to be unconstitutional, the question arises whether the Conference can invalidate its own acts.

It is obvious that it will not be possible for the same Conference which adopts the alleged unconstitutional acts to declare them 'unconstitutional', but as the decisions of one Conference do not appear to be binding on other Conferences,<sup>2</sup> a future Conference may modify or cancel the acts adopted by a previous Conference, but the modification or cancellation will be based on a change of policy, rather than on a finding that the acts of the previous Conference were 'unconstitutional'.

It seems clear, therefore, that at the present time the acts of the Conference cannot be invalidated on the grounds that they are 'unconstitutional', and all its acts are binding to the extent prescribed by the Constitution until they are modified or cancelled by the Conference itself.

The present position does not mean that the question of 'unconstitutional acts' has no meaning in the Conference. Decisions of the Conference are adopted in accordance with the procedure laid down in the Constitution, and claims that some acts which it proposes to adopt are unconstitutional are decided in the same way. The practice of the Organization in fact indicates that the Conference rejected some proposals put to it in the past either because some delegates considered that it would be unconstitutional for the Conference to adopt them, or because the procedure laid down in the Constitution was not strictly complied with in the submission of the proposals.<sup>3</sup> As the effect of these rejections is that such proposals will not be brought before the Conference until at least its next session, it seems that through its decision-making procedure, Members and industrial organizations exercise, through their representatives, some form of control over the adoption by the Conference of acts which a majority of them consider to be unconstitutional. But once any acts have been adopted by the Conference with the approval of these representatives, the question of 'unconstitutionality' ceases to be significant with respect to such acts.

<sup>1</sup> Cf. Article 59 of the Statute of the I.C.J. which provides that 'the decision of the Court has no binding force except between the parties and in respect of that particular case'.

<sup>2</sup> This is demonstrated by the Hungarian delegation question. In 1957 the Conference decided that it was unconstitutional for the I.L.O. to refuse to admit the delegates and advisers appointed by the Government of Hungary into the proceedings of the Conference, but in 1958, the Conference changed its position on the matter: see above, pp. 270-3.

<sup>3</sup> See above, pp. 270, and 271 n. 1.



## V. GENERAL CONCLUSIONS

The present inquiry has revealed certain consistent practices concerning allegations of illegality or unconstitutionality of the acts of the organs of the International Labour Organization, from which practices it seems possible to draw some general conclusions about *ultra vires* acts in international organizations.

1. There are no general rules of international law analogous to those on *ultra vires* in the municipal law, and there are differences of opinion between international lawyers as to the relevance of the concept of *ultra vires* in international law; but as international organizations derive their powers from constitutions, the possibility exists that they may sometimes act in a manner which is not entirely in conformity with the provisions of their constitutions.

2. Members of an international organization possess the right, even in the absence of particular constitutional provisions on the matter, to challenge a proposal made before an organ of the organization, or to challenge the organ's acts, on the grounds of illegality or unconstitutionality.

3. The organ whose competence or jurisdiction has thus been impugned has the competence, in the absence of constitutional provisions to the contrary, to decide the matter in accordance with its normal decision-making processes.

4. If the organ whose competence or jurisdiction is challenged decides that it can deal with the matter concerned, its acts and decisions will give rise to binding obligations for the Members of the organization to the extent prescribed in the Constitution or other relevant instruments. If, however, the acts or decisions of the organ are subject to appeal to, or approval or confirmation by, another organ or entity, the acts will not, unless the constitution provides otherwise, give rise to any binding obligations until they are approved or confirmed.

5. Members of an international organization may request that the International Court of Justice be asked for an Advisory Opinion on the matter, but the determination of the Court in this respect is not automatically binding on the international organization, its organs, or its Members.

6. Although, where the acts or decisions of an organ are not subject to appeal to, or approval or confirmation by, another organ, then the question of illegality or unconstitutionality does not appear to be very relevant, the decision-making processes of the organs which make it possible for proposals to be rejected if not voted for by a majority provide some checks and controls over the acts of international organizations and their organs. A proposal or an act which a majority of the members of the organization considers to be illegal or unconstitutional has no chance of being adopted by an international organization. It has been argued, however, that these decision-making processes do not provide adequate safeguards, especially in cases where a small majority wishes to impose its wishes on a substantial minority. There may be some justification in this argument, since international organizations, like international law, are founded on the consent of States. It would therefore seem appropriate, in order to

dissipate the fears of Members and to ensure due legal process in their operations, for international organizations to establish independent judicial machineries, with powers to give binding decisions, for the determination of claims of illegality or unconstitutionality with respect to the acts of international organizations and their organs.

# DEROGATIONS UNDER HUMAN RIGHTS TREATIES\*

By ROSALYN HIGGINS<sup>1</sup>

## I. INTRODUCTION

THIS article is about derogations from human rights obligations. It is limited to an examination of derogations from rights enunciated in international treaties. Both individuals and States have rights and obligations. Recent years have witnessed a considerable drive towards improving the position of the individual, accompanied by a widespread feeling that the traditional views on the place of the individual in international law,<sup>2</sup> and the traditional rules on nationality of claims,<sup>3</sup> tipped the scales exceedingly in favour of the State. In attempting to redress the balance, it is necessary, however, for improved human rights to be matched by accommodations in favour of the reasonable needs of the State to perform its public duties for the common good.<sup>4</sup> Looked at this way, it will be seen that a variety of techniques are available for effecting such accommodations: these techniques include the possibility of the denunciation of a treaty, reservations as to its terms, articles stating that individual rights can only be exercised in conformity with the rights of others, clauses in the text interpreting the scope of rights guaranteed, 'clawback' clauses and derogations clauses *stricto sensu*. By a 'clawback' clause is meant one that permits, in normal circumstances, breach of an obligation for a specified number of public reasons. Derogations *stricto sensu* are those which allow suspension or breach of certain obligations in circumstances of war or public emergency. These are all techniques of accommodation, providing for a wide variety of possibilities. This

\* © Dr. Rosalyn Higgins, 1977.

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<sup>2</sup> See, for example, Nørgaard, *The Position of the Individual in International Law* (Copenhagen, 1962); Oppenheim, *International Law*, vol. 1 (2nd edn., 1912), pp. 362-9.

<sup>3</sup> See the onus placed on a willing protector State by the *Nottebohm* case, *I.C.J. Reports*, 1955; and also the exposed position of the individual where a State is willing to protect, as revealed in the *Barcelona Traction* case, *I.C.J. Reports*, 1970.

<sup>4</sup> For a brief allusion to accommodations of this sort as necessarily complementary to the formulation of principles, see McDougal, 'Human Rights and Public Order: Principles of Content and Procedure for Clarifying General Community Policies', *Virginia Journal of International Law*, 14 (1974), p. 386 at p. 390. More detailed reference to 'the promotion of the aggregate common interest . . . through an accommodation of the interests of any particular individual . . . with those of other particular individuals and with the interests of all individuals' is to be found in the opening pages of McDougal, Lasswell and Chen, 'The Aggregate Interests in Shared Respect and Human Rights: The Harmonization of Public Order and Civic Order', *Yale Law Journal* (forthcoming).



article is limited to derogations *stricto sensu* and to those elements in 'clawback' clauses which refer to national security, the requirements of democracy, and *ordre public*.

It has always been the view in some quarters that any form of derogation, reservation<sup>1</sup> or qualification is inappropriate in conventions for the promotion of human rights. In general terms, the suggestion has been made that human rights treaties have the character of *jus cogens*.<sup>2</sup> There certainly exists a consensus that certain rights—the right to life, to freedom from slavery or torture—are so fundamental that no derogation may be made. And international human rights treaties undoubtedly contain elements that are binding as principles which are recognized by civilized States, and not only as mutual treaty commitments.<sup>3</sup> Some treaties may focus almost exclusively on such elements—such as the Genocide Convention—while others may cover a wider range of rights, not all of which may have for the present a status which is more than treaty-based. This being said, neither the wording of the various human rights instruments nor the practice thereunder leads to the view that all human rights are *jus cogens*.<sup>4</sup>

With the entry into force of the United Nations Covenants, and the considerable case law that now exists under the European Convention on Human Rights, the time is ripe for an examination of practice in relation to 'clawback' and derogation clauses. There are certain principles that should guide such an examination. The accommodation being sought is not between the State and the individual; rather it is between the individual's rights and freedoms and the rights and freedoms of the community at large.<sup>5</sup> This writer shares<sup>6</sup> the view that derogations to human rights obligations are acceptable only if events make

<sup>1</sup> On which see below, pp. 316–19.

<sup>2</sup> The very notion of *jus cogens* is, of course, controversial. See especially Schwarzenberger, 'International *Jus Cogens*', *Texas Law Review*, 43 (1965), p. 455, and Schwelb, 'Some International Aspects of *Jus Cogens*', *American Journal of International Law*, 61 (1967), p. 946. The Convention on the Law of Treaties assumes, *per contra*, the existence of norms of *jus cogens*, defining them as norms 'from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character': Article 53, *International Legal Materials*, 8 (1969), at p. 699.

<sup>3</sup> For comments that view the prohibition of genocide in this light, see Waldock, *Yearbook of the I.L.C.*, 1963–I, at p. 131; and Rosenne, *ibid.*, at p. 74. See also the statement of the International Court, referring to genocide, slavery and racial discrimination, that 'some of the corresponding rights of protection have entered into the body of general international law': *Barcelona Traction case (Second Phase)*, Judgment, *I.C.J. Reports*, 1970, at p. 32.

<sup>4</sup> Schwelb has argued that the State practice surrounding the drafting of various human rights treaties 'indicates that the idea of international *jus cogens* has not yet penetrated into the day to day thinking and actions of governments': *American Journal of International Law*, 61 (1967), p. 946 at p. 956.

<sup>5</sup> 'The precise delineation of the rights of any particular individuals in any particular context must, however, always require an infinitely delicate reconciliation with the comparable rights of other individuals; and, in the domain of human rights as in other domains, the protection accorded the individual's rights and freedoms must, on occasion, especially in times of crisis, be accommodated to the overriding inclusive interests of all community members': McDougal, Lasswell and Chen, 'Human Rights and World Public Order: A Framework for Policy-Oriented Enquiry', *American Journal of International Law*, 63 (1969), p. 237 at p. 267.

<sup>6</sup> With McDougal, Lasswell and Chen, *loc. cit.* (previous note), p. 267. The learned authors briefly recommend, within the framework of their own methodology, criteria for identifying when it is necessary to derogate in crisis situations.

them necessary and if they are proportionate to the dangers that those events represent. It is important for measures of derogation to be subject to international scrutiny and review. It is in the light of such tests that the practice is to be analysed.

## II. THE UNITED NATIONS COVENANTS

### A. ACCOMMODATIONS

Historically, instruments on human rights have always acknowledged that the individual's rights must be matched by his duties to the community of which he is a part. All the major instruments thus contain two types of clause which deal with this fact: first, a clause which stipulates that the instrument itself does not give any State, group, or person 'any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth therein';<sup>1</sup> second, a general clause which indicates that limitations upon the exercise of rights may be permitted

for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order, and the general welfare in a democratic society.<sup>2</sup>

This general clause, originally enunciated in the Universal Declaration of Human Rights, is echoed in similar terms in the United Nations Covenant on Economic, Social, and Cultural Rights.<sup>3</sup>

In both the European Convention on Human Rights and the United Nations Covenant on Civil and Political Rights, however, a somewhat different technique is employed. The references to the need for rights to be exercised in conformity with morality, public order, general welfare, etc., appear not as a general clause but as qualifications to specific freedoms. Thus in the United Nations Covenant, Article 12 (3) qualifies the right of a person lawfully within a territory to have freedom of movement therein by reference to restrictions 'which are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant'.<sup>4</sup> The right of freedom

<sup>1</sup> Article 30, Universal Declaration of Human Rights; cf. Article 5 of the U.N. Covenant on Economic, Social and Cultural Rights; Article 5 (1) of the U.N. Covenant on Civil and Political Rights; and Article 17 of the European Convention on Human Rights. This last differs from Article 30 of the Declaration in that it contains the additional phrase 'or at their limitation to a greater extent than is provided for in the Convention'. This phrase, directed at action by the State, ensures that 'in counteracting the activities of those who are exercising the rights guaranteed under the Convention in order to undermine it', it may not itself transgress the limitations set: see Fawcett, *Application of the European Convention on Human Rights* (1969), pp. 254-5.

<sup>2</sup> Article 29 (2), Universal Declaration of Human Rights.

<sup>3</sup> 'The State may subject such rights only to such limitations as are determined by law only insofar as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society' (Article 4).

<sup>4</sup> Interestingly, the right of a person not to be arbitrarily deprived of the right to enter his own country seems not to be subject to this qualification: see Article 12 (4). However, the word 'arbitrarily' probably serves to achieve the same result.



of movement not being covered by the European Convention,<sup>1</sup> there is no equivalent qualification. Article 14 of the United Nations Covenant on Civil and Political Rights allows the exclusion of press and public from all or part of a trial 'for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice...'. Article 6 (1) of the European Convention contains a comparable qualification.<sup>2</sup> Article 18 of the United Nations Covenant subjects freedom to manifest one's religion or beliefs to limitations that are both authorized by law and 'necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others', thus basing itself closely on the qualification contained in Article 9 (2) of the European Convention<sup>3</sup>—though significantly, the reference in the European Convention to measures 'necessary in a democratic society' is not to be found in the global model.

In the United Nations Covenant, freedom of expression is stated specifically to carry with it certain rights and responsibilities, and limitations may thus be placed upon it such as are authorized by law and are necessary to protect the rights or reputations of others or to protect national security, public order, public health or morals.<sup>4</sup> This is somewhat narrower than the comparable qualification in the European Convention (save for the absence of any reference to what is necessary in a democratic society), for the latter includes restrictions for the purpose of preventing the disclosure of information received in confidence, and for maintaining the authority and impartiality of the judiciary.<sup>5</sup> The inclusion in Article 10 (2) of the European Convention of a reference to 'the prevention of disorder or crime' (a phrase also used in Articles 8 (2) and 11 (2)) stands in contrast to the phrase employed in Article 9 (2) of that Convention, of 'public order, health and morals'.<sup>6</sup>

<sup>1</sup> But see Protocol No. 4, Article 2 (3); and below, p. 312.

<sup>2</sup> See below, p. 309.

<sup>3</sup> For comment on which see below, pp. 310–11.

<sup>4</sup> Article 19 (3). It must of course be noted that, even within the western world, the relationship under the law between freedom of information and expression, and other rights, varies greatly. The interpretation over recent years of the scope of the First Amendment under U.S. Constitutional Law has led to results that—in terms of inroads into other rights of the individual—are very hard for a European lawyer to appreciate: see especially the burgeoning case law and literature on the (very extensive) freedom of the press under the First Amendment, e.g. *Gertz v. Robert Welch Inc.*, 94 Sup. Ct. 2997 (libel) and *Nebraska Press Association v. Stuart*, 44 U.S.L.W. 5149 (fair trial). The First Amendment has been interpreted as allowing, for example, pre-trial publication of the record of the accused. The protection of the right of fair trial may not be by means of a restriction on the right of free speech and publication.

<sup>5</sup> Article 10 (2). And see below, p. 311.

<sup>6</sup> The leading textbooks on the European Convention offer little guidance on this; nor is any to be found in the *travaux préparatoires* presently available. Indeed, the unhelpful layout and totally inadequate indexing of *Collected Editions of the Travaux Préparatoires of the European Convention of Human Rights*, vols. 1–3 (1975), make it difficult to extract almost any relevant information therefrom. It has been suggested by one well-informed commentator that in any event, 'public order' in the European Convention has a different meaning from 'public order/*ordre public*' as used in the Covenant. He states that in the latter, the phrase is broader, meaning 'public policy', whereas in the former what is meant is the absence of disorder. The scope of the restric-



Article 21 of the United Nations Covenant on Civil and Political Rights guarantees the right of peaceful assembly and Article 22 the right of freedom of association. In almost identical wording, they contain qualifications in respect of measures imposed in conformity with the law, and refer to interests of national security, public safety, public order (*'ordre public'*), the protection of public health and morals or the protection of the rights and freedoms of others. Interestingly, the further qualification that such measures be those 'necessary in a democratic society' finds its way back into these two articles. These qualifications closely parallel those in Article 11 of the European Convention, though the latter refers to the prevention of disorder or crime rather than public order.<sup>1</sup>

Standing somewhat separately is the guarantee for an alien, under Article 13 of the Covenant, that he may only be expelled from a territory by a decision reached in accordance with law, and shall be allowed to submit claims for his non-expulsion and have his case reviewed, and be represented before the competent authority 'except where compelling reasons of national security otherwise require'.

Now that the United Nations Covenants are in effect, it remains to be seen how the relevant institutions (the Commission on Human Rights in its study of and recommendations on reports under the Covenant on Economic, Social and

tion is thus, in his view, wider in the Covenant than in the Convention: see Schwelb, 'The International Covenants on Human Rights' in Eide and Schou (ed.), *International Protection of Human Rights, Nobel Symposium 7*, p. 103 at pp. 114-15.

See also the unsuccessful attempts of the United Kingdom to replace the words 'public order' by 'prevention of disorder or crime': Report of the Commission of Human Rights, *ECOSOC, Official Records*, 14th Session, Suppl. No. 4, E/2256, pp. 192, 236, 242, 249, 255.

Commenting on the different phrasing of Articles 8, 10 and 11 on the one hand, and 9 (2) on the other, Fawcett suggests that the French texts indicate that 'too much importance must not be attributed to the difference', and that in both 'public order' refers to prevention of local breaches of the peace. He suggests that the phrase 'public safety', where employed, is directed to 'the maintenance of the national social and political order': Fawcett, *Application of the European Convention on Human Rights* (1969), p. 208. What is clear is that the difficulty is not resolved by the somewhat crude use of *'ordre public'* in the English text of the Fourth Protocol as a purported translation of 'public order'. It is to be noted that *'ordre public'* does not appear in the French texts of Articles 8-11, simply because the notion is expressed in each of the particular purposes for which the restrictions of the second paragraph are permitted. The author is grateful to Professor James Fawcett for drawing these points to her attention. Schwelb finds significant the fact that in the Covenant there is no specific reference to the rights of a State under Article 19 of the Covenant to license visual or auditory devices, whereas this right is specifically mentioned in Article 10 of the European Convention. For Schwelb's view, this confirms that in the Covenant 'public order' is being used in the wider sense. For interpretations of the term as being sufficiently broad to cover, *ipso facto*, licensing by the State, see Report of the Commission of Human Rights, 8th Session (1952), *ECOSOC Official Records*, 14th Session (1961), A/5000, para. 33. Schwelb himself notes, *per contra*, that the Draft Convention on Freedom of Information both lists 'public order/*ordre public*' as a ground for restriction and refers to 'duly licensed' visual or auditory devices: *General Assembly, Official Records (G.A.O.R.)*, 14th Session (1959), Report of Third Committee, A/4341, Annex and 15th Session (1960-1), Report of Third Committee, A/4636, Annex; Schwelb, *op. cit.*, p. 127, para 65.

<sup>1</sup> See below, p. 312.

For an interesting survey of the philosophical and constitutional ideas inherent in the requirement of Articles 29 (3) of the Universal Declaration—that the rights and freedoms should not be exercised contrary to the purposes and principles of the United Nations—see Daes, 'Restrictions and Limitations on Human Rights' in Cassin, *Amicorum Discipulorumque Liber III*, pp. 80-93.

Cultural Rights, and the new Human Rights Committee under the Covenant on Civil and Political Rights) handle derogations made by States parties under those clauses.

## B. DEROGATIONS

Although the Universal Declaration of Human Rights contained its own 'accommodation' clauses, there was no derogation clause as such. In the move to formally binding instruments, it became necessary to consider such a clause. The International Covenant on Economic, Social and Cultural Rights contains no derogation provision, thus implicitly confirming the view that such a clause should only be deemed necessary where there are strong implementation provisions.

By contrast, Article 4 of the International Covenant on Civil and Political Rights provides:

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from Articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16, and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the rights of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

This clause is very close indeed to the original draft;<sup>1</sup> its acceptance occasioned no great problems, though it was not adopted until 1963.<sup>2</sup> It is clearly modelled on Article 15 of the European Convention, though certain differences exist.<sup>3</sup> It had been wondered whether, given the existence of a general limitations clause and the 'permissive limitation'<sup>4</sup> to certain articles of the Covenant,<sup>5</sup> a separate derogations clause was needed. The view prevailed, however, that the reference in these to 'national security' and 'public order' would not suffice as adequate legal guidance in times of major emergency. The *travaux préparatoires* reveal that on the one hand it was intended to avoid abuse—that the emergency should be of such a magnitude as to threaten the life of the nation as a whole; while on the other, 'it was felt that the Covenant should not envisage, even by implication, the possibility of war, as the United Nations was established with

<sup>1</sup> *G.A.O.R.*, 10th Session, Annexes, a.i. 28, pt. 11, para. 34.

<sup>2</sup> *G.A.O.R.*, 18th Session, Annexes, vol. 2. a.i. 48.

<sup>3</sup> See below, p. 289.

<sup>4</sup> This phrase is used in the Report in *G.A.O.R.*, 10th Session, Annexes, a.i. 28, pt. 11, para. 36.

<sup>5</sup> On which see above, pp. 283–5.



the object of preventing war'.<sup>1</sup> It was also intended that 'public emergency' should cover, if necessary, natural disasters.

It will be seen that public proclamation is required as a further measure against abuse, and three further conditions are specified in paragraph 1. There was general agreement on the first condition (that the measures be those 'strictly required by the exigencies of the situation'). As for the second, it was decided that the reference to compatibility with their international law obligations needed no embellishment by further reference to the Charter and the Universal Declaration of Human Rights.<sup>2</sup> The use of the word 'solely' in the third condition regarding non-discrimination occasioned some debate. The inclusion of the word is clear evidence that derogations which inadvertently discriminate may, if the other conditions are met, be lawful.

Paragraph 2 of Article 4 places greater limitations upon the rights of derogation than does Article 15 of the European Convention. There are more rights in the Covenant which admit of no reservation.<sup>3</sup> Not only is there no derogation allowed from the right to life and the prohibition against torture,<sup>4</sup> but also none from the prohibition against slavery and servitude<sup>5</sup> (but not forced labour), and the guarantee of non-imprisonment for inability to fulfil a contractual obligation.<sup>6</sup> Emergency conditions do not allow the introduction of retrospective penal punishment by way of derogation—an important provision.<sup>7</sup> Nor are derogations permitted from the right to recognition before the law<sup>8</sup> or the right to freedom of thought, conscience or religion.<sup>9</sup>

What is not clear at the present time is the relationship of Article 4 to the interpretation procedures. May derogations be made from them, not being prohibited by Article 4 (2)? Conversely, will the new Human Rights Committee be authorized to pass upon the compatibility of derogations with the requirements of Article 4? Although there is no specific guide in the articles that indicate the functions of the Committee, such authority may perhaps be implied in the power to consider reports which 'indicate the factors and differences, if any, affecting the implementation of the present Covenant'.<sup>10</sup> The assumption of such powers is desirable, given that strong implementation measures seem the *sine qua non* of derogation clauses; and the Human Rights Committee will be following the practice of the European Commission on Human Rights if it interprets its powers in this way.<sup>11</sup>

<sup>1</sup> G.A.O.R., 10th Session, Annexes, a.i. 28, pt. 11, para. 39. This head-in-the-sand attitude (which was paralleled by discussion as to whether a state of war could lawfully exist under the Charter: see Higgins, *The Development of International Law through the Political Organs of the United Nations* (1963), p. 213) views war as a legal regime rather than as a factual situation into which a State acting defensively might find itself thrust. It stands in contrast to the explicit reference to war in Article 15 of the European Convention.

<sup>2</sup> G.A.O.R., 10th Session, Annexes, a.i. 28, pt. 11, para. 43.

<sup>3</sup> Cf. p. 289 below.

<sup>4</sup> Article 8 (1) and (2).

<sup>5</sup> Article 15.

<sup>6</sup> Article 18. Oddly, Article 18 has a 'clawback' clause, however, in paragraph 3.

<sup>7</sup> Article 40 (2).

<sup>8</sup> See below, p. 295. The only derogations to date under Article 4 are those made by Chile and the United Kingdom. See U.N. Doc. CN.306, 1976 (5 October 1976).

<sup>4</sup> Articles 6 and 7.

<sup>6</sup> Article 11.

<sup>8</sup> Article 16.



The notification procedure is asymmetrical, i.e. notification is to the Secretary-General and not to the body which may pronounce authoritatively on the status of the derogation.<sup>1</sup> But so is the notification procedure under the European Convention.<sup>2</sup>

### III. THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Within the framework of the European Convention on Human Rights, derogations may properly be seen as part of a network of restrictions upon the rights guaranteed. This article is concerned with restrictions in both the senses found in the Convention: derogations *stricto sensu* or derogation by *ordre public* 'clawback'. In the former category stands Article 15 of the Convention; in the latter category, Articles 8, 9, 10 and 11 of the Convention and Article 2 (3) of the Fourth Protocol. The rights guaranteed by the Convention are restricted also by reservations<sup>3</sup>—which we have mentioned above—and by the notion of inherent limitations,<sup>4</sup> as well as by the concept of abuse of rights.<sup>5</sup> These qualifications, not being derogations in the sense indicated, are beyond the scope of this article. Nor does this study purport to deal with those rights the lawful parameters of which are indicated in the very clauses which deal with them, such as Articles 5<sup>6</sup> and 6<sup>7</sup> of the Convention, or Article 1 of the First Protocol,<sup>8</sup> or Article 2 (3)

<sup>1</sup> But probably only when it is seized of an application against the derogating State: see below, p. 292.

<sup>2</sup> Below, p. 292.

<sup>3</sup> Under Article 64 of the Convention.

<sup>4</sup> For a discussion, see Jacobs, *The European Convention on Human Rights* (1975), at pp. 198–201. Professor Jacobs expresses deep scepticism over the existence of 'inherent limitations' as an identifiable legal concept, preferring the view that only restrictions authorized by the Convention are allowed.

<sup>5</sup> Article 17 provides: 'Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.' This is concerned with abuse of substantive rights. There may also be abuse of the right of petition: see Schwelb, 'The Abuse of the Right of Petition', *Human Rights Journal*, 3 (1970), p. 177. See also, e.g., A. 2424/65, *Yearbook of the European Convention on Human Rights* (hereafter cited as *Yearbook*), 9 (1966), p. 426; A. 4517/70, *Yearbook*, 14 (1971), p. 572.

<sup>6</sup> Article 5 provides for the right to liberty and security of person, and provides that no one shall be deprived of his liberty save in certain listed cases and in accordance with a procedure prescribed by law. The listed cases cover various authorized forms of arrest and detention: for a survey on the practice, see Fawcett, *Application of the European Convention on Human Rights* (1966), at pp. 66–120.

<sup>7</sup> Article 6 entitles everyone, in the determination of his civil rights and obligations or of any criminal charge against him, to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Paragraphs (2) and (3) of Article 6 provide specific procedural guarantees in respect of criminal proceedings. However, the second sentence of Article 6 (1) qualifies the right to a public hearing: those qualifications relating to 'the interests of juveniles or the protection of the private life of the parties', or to 'the interests of justice' are beyond the reach of this study. But note that Article 6 (1) also states that 'the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society'—on which see below, p. 309.

<sup>8</sup> Article 1 of the First Protocol guarantees peaceful enjoyment of one's possessions, with deprivation being forbidden 'except in the public interest and subject to the conditions provided

of the Fourth Protocol.<sup>1</sup> It will thus be seen that we here concern ourselves with those derogations and qualifications which are expressed in terms of reasons of State.

#### A. DEROGATIONS IN WAR OR OTHER NATIONAL EMERGENCY

Article 15 of the European Convention specifically envisages the possibility of a member State's derogating from its obligations in times of national emergency. It provides:

(1) In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

(2) No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

(3) Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary-General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

This form of wording was adopted fairly late in the process of drafting the Convention,<sup>2</sup> the initial suggestions being for a clause that would follow Article 29 (2)<sup>3</sup> of the Universal Declaration of Human Rights. The Article as it now appears is based upon a United Kingdom amendment to the initial recommendation of the Consultative Committee.<sup>4</sup> The United Kingdom has had to avail itself of Article 15<sup>5</sup> on several occasions.

for by law and by the general principles of international law'. However, the next sentence provides that the right of a State to enforce such laws 'as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes. . .' is not impaired; and on this aspect, see below, p. 308.

<sup>1</sup> The Fourth Protocol deals with personal liberty and freedom of movement. Freedom to leave a country is subject to restrictions enumerated under Article 2 (3). Such restrictions as refer to, e.g., the qualification of the right of a convicted prisoner to leave, do not here concern us. But in so far as Article 2 (3) also refers to 'the maintenance of *ordre public*', see below, p. 309.

<sup>2</sup> See Doc. 108 of the Consultative Assembly of the Council of Europe, 1st Session, 18th Meeting, pp. 261-4; for a brief historical survey of the drafting, see Velu, 'Le contrôle des organes prévus par la convention européenne aux droits de l'homme sur le but, le motif ou l'objet des mesures d'exception dérogeant à cette convention', in *Mélanges offerts à Henri Rolin* (Paris, 1964), pp. 462-76 at pp. 462-5.

<sup>3</sup> On which see above, p. 283.

<sup>4</sup> See *Travaux préparatoires*, vol. 2, pp. 355, 424-5.

<sup>5</sup> The following derogations have been made under Article 15: *Yearbook*, 1 (1955-7): Ireland (special powers of arrest and detention), p. 47; United Kingdom (detention in respect of emergency in Federation of Malaya and Colony of Singapore and Cyprus; and deportation to Seychelles in respect of persons in Cyprus; and detention, powers of search and seizure, prohibition of publication in respect of Ireland; detention in respect of Northern Rhodesia), pp. 48-51, (detention in respect of Guiana), p. 47; *Yearbook*, 2 (1958-9): United Kingdom (arrest and detention, Cyprus), pp. 78-82, (arrest and detention, Nyasaland), pp. 84-6; *Yearbook*, 3 (1960):



*Temporal requirements*

So far as the procedural requirements of Article 15 (3) are concerned, certain observations may be made. It is necessary to provide full information about the measures and to explain why they are needed. It is normal, when a State feels that it must derogate from its obligations under Article 15, for it to explain the nature of the emergency; to identify the legislation, orders or decrees which appear to derogate from the Convention; and to explain briefly their significance. The Notes-Verbaux of the United Kingdom have traditionally contained these elements, and it has been usual briefly to indicate the way in which the derogations themselves are being rigorously controlled.<sup>1</sup> Although under Article 15 (3) the Secretary-General of the Council of Europe is to be kept fully informed, there is no indication of a required time period. In the *Lawless* case the Court made it clear that if the information were delayed then the obligation to provide full information would not have been met.<sup>2</sup> That does not, however, answer the question whether a notice of derogations otherwise valid under Article 15 (1) may be relied on notwithstanding a failure to meet the requirements of Article 15 (3). In other words, is non-reliance on Article 15 (1) the sanction that underlies Article 15 (3)? In the *Lawless* case the Irish Government had given notice of the measures some twelve days after their adoption. As the Court did not find this unduly delayed, the question of whether a breach of Article 15 (3) would prevent reliance on Article 15 (1) was left open. The Irish Government had argued before the Commission that a violation of Article 15 (3) would not nullify a proper derogation under Article 15 (1). The Commission, for its part, in oral argument before the Court, seemed inclined to accept that as a general principle. Arguing on behalf of the Commission, Sir Humphrey Waldock none the less indicated that 'the Commission, as at present advised, hesitates to say that the right of the State to justify its actions [under Article 15 (1)] . . . may never be affected by its failure to keep the Secretary-General informed'.<sup>3</sup> He

United Kingdom (detention, Aden), p. 68, (detention, Singapore), pp. 74-80, (detention, Kenya), pp. 82-90; *Yearbook*, 4 (1961); United Kingdom (detention, Nyasaland), pp. 38-40, (arrest and detention, Zanzibar), pp. 44-6; Turkey (emergency measures of unspecified nature following revolution), pp. 54-60; *Yearbook*, 5 (1962): United Kingdom (detention, Northern Rhodesia), pp. 8-9; *Yearbook*, 6 (1963): Turkey (proclamation of a state of siege), p. 28; *Yearbook*, 7 (1964): Turkey (siege extended), pp. 22-6; United Kingdom (detention, Guiana), pp. 28-9; *Yearbook*, 8 (1965): United Kingdom (detention, Guiana), pp. 11-14, (detention, arrest, extended powers of entry and search, Mauritius), pp. 14-16; *Yearbook*, 9 (1966): United Kingdom (detention, Aden), p. 16; *Yearbook*, 10 (1967): Greece (suspension of Constitution), pp. 26-44; *Yearbook*, 11 (1968): Greece (suspension of Constitution), pp. 10-35; *Yearbook*, 12 (1969): Greece (suspension of Constitution), pp. 38-72; United Kingdom (detention, Northern Ireland), pp. 72-4; *Yearbook*, 13 (1970): Turkey (state of siege), pp. 18-22; *Yearbook*, 14 (1971): Turkey (extensions of state of emergency), pp. 24-32; United Kingdom (internment, Northern Ireland), pp. 32-3; *Yearbook*, 15 (1972): Turkey (state of emergency), pp. 16-22; *Yearbook*, 16 (1973): Turkey (martial law), pp. 16-24; United Kingdom (arrest, detention, search, seizure, Northern Ireland), pp. 24-8; *Yearbook*, 17 (1974): Turkey (martial law), pp. 22-8; *Yearbook*, 18 (1975): Turkey (martial law), pp. 8-16; United Kingdom (detention and internment, Northern Ireland), p. 18.

<sup>1</sup> See United Kingdom derogations, *Yearbook*, 1 (1955-7), at pp. 48-51.

<sup>2</sup> See *Yearbook*, 4 (1961), p. 438 at pp. 482-6.

<sup>3</sup> *Lawless* case, *Publications of the European Court of Human Rights*, Series B, *Pleadings, Oral Arguments*, Doc. 1960-1, p. 388.



had in mind the sort of situation where a State deliberately withheld information in order not to draw attention 'to a highly questionable matter'.<sup>1</sup> However, if the matter were 'highly questionable' it would probably fail to meet the requirements of Article 15 (1) itself. Nevertheless, one can certainly envisage that matters *ratione temporis* under Article 15 (3) might not so much automatically prevent reliance on Article 15 (1) as provide evidence of bad faith, which would of itself be an element to be taken into consideration in deciding whether the tests of Article 15 (1) have been satisfied.

In the *Greek* case comparable issues arose before the Commission. By a letter of 3 May 1967 the military Government of Greece, referring to Article 15 (3), informed the Secretary-General of the Council of Europe that by the Royal Decree of 21 April 1967 certain articles of the Greek Constitution had been suspended 'in view of internal dangers which threaten public order and the security of the State'.<sup>2</sup> The letter stated that the Secretary-General would be informed, in accordance with Article 15 (3), when these 'exceptional measures' ceased.<sup>3</sup> The applicant Governments<sup>4</sup> claimed that Greece was in violation of Article 15 (3) in failing to indicate the particular articles of the Convention from which it had derogated.<sup>5</sup> The Commission found on this point that Article 15 (3) does not oblige a government expressly to indicate the particular articles, and that in the present case 'the Articles of the Convention affected by the derogation were indirectly indicated by the respondent Government when it communicated the full text of the Suspended Articles of the Constitution of 1952'.<sup>6</sup> The applicants further alleged that Greece had violated Article 15 (3) by failing to furnish full texts of the emergency legislation<sup>7</sup> and to provide full information with regard to administrative measures taken.<sup>8</sup> The applicants claimed that the *Lawless* case had made it clear that, although these words did not appear in Article 15 (3), the requirement was for notification without any avoidable delay; and that the Commission was competent to examine the conformity of a notice of derogation with the obligations under Article 15 (3).<sup>9</sup> These arguments found some favour with the Commission. It observed that the notice of derogation was communicated twelve days after the assumption of power, and that the texts of the Royal Decree and suspended Constitutional articles were transmitted some three weeks after that. This was notice given within a reasonable time.<sup>10</sup> However,

<sup>1</sup> Ibid., p. 389. See also Buerghenthal, 'The Greek Case before the European Commission', *American Journal of International Law*, 62 (1968), p. 444 at pp. 445-6.

<sup>2</sup> For full text, see *Yearbook*, 10 (1967), p. 26.

<sup>3</sup> The texts of Royal Decree No. 280 of 21 April 1967, and the suspended Articles of the Greek Constitution, were transmitted to the Secretary-General on 25 May 1967.

<sup>4</sup> Norway, Sweden and Denmark (first applicants) and the Netherlands, in submissions commenced in September 1967. The Governments of Belgium, Iceland and Luxembourg associated themselves with the Applicants but did not formally become parties.

<sup>5</sup> Memorial of 25 March 1968, pp. 11, 70; hearing of May 1968, p. 99; hearing of September 1968, p. 139.

<sup>6</sup> *Yearbook*, 12 (1969), p. 42, para. 80.

<sup>7</sup> Applications of 20 September 1967, Pt. IV; Memorial of 25 March 1968, p. 70; hearing of May 1968, pp. 98-9; hearing of September 1968, pp. 139-40; hearing of June 1969, pp. 98-9.

<sup>8</sup> Hearing of May 1968, pp. 98-9; hearing of June 1969, p. 97.

<sup>9</sup> *Lawless* case (*Merits*), Judgment of 1 July 1961, 'The Law', para. 44.

<sup>10</sup> *Yearbook*, 12 (1969), para. 80 (1).

while notice of measures taken might have been within a reasonable time, the same was not true of the *reasons* for the derogations. These reasons were only communicated on 19 September 1967. Moreover, the information was incomplete: the text of the new Constitution of 1968 was not notified under Article 15 (3) as such but only emerged as part of these proceedings.<sup>1</sup> The Commission stated that information given to the Commission or a subcommission in proceedings under Article 24 or 25 'cannot rank as, or replace, information required under Article 15 (3), since information communicated under this provision is to be brought to the knowledge of all High Contracting Parties and of the Convention Organs while that given to the Commission or subcommission is limited to that organ or the party before it'.<sup>2</sup> Thus although the texts of new legislation and the Constitution did eventually reach the Commission, Greece was in breach of Article 15 (3)—not so much for tardiness but because the information came only by virtue of the proceedings.

Two comments may be made. Article 15 (3) refers to the Secretary-General and not the Commission. It does not in terms stipulate that the notification be passed to other Contracting Parties for their assessment. The requirement of circulation of derogation-notifications stems rather from a resolution of the Committee of Ministers.<sup>3</sup> Further, the distinction that the Commission was making would seem more important were the authority of the Commission to see if the tests of Article 15 (3) are met activated *upon receipt* of the notification. But although the *dictum* of the Court in the *Lawless* case upon this aspect of the Commission's task was not limited to action in the context of Articles 24 and 25, in fact the only chance the Commission has so to pronounce is when an application by another State or individual has been made. The ability of the Commission to examine the conformity of a notice of derogation with Article 15 (3) appears to operate only when there exists an application against the State concerned. The opportunity to oversee derogation notices independent of this situation does not seem to arise.

The Commission also reported that the information it had been given was incomplete,<sup>4</sup> especially so far as the detention of persons without Court orders was concerned.<sup>5</sup>

Mr. Fawcett, in his dissent on this last point, came close to saying that a finding of breach for incompleteness should only occur when a respondent State refuses to supply requested information. He suggested that, if the notifications of Greece of 3 May 1967 or later did not satisfy the requirements of Article 15 (3), then the Secretary-General should have requested further information: 'In the absence of any such request, the respondent Government

<sup>1</sup> *Yearbook*, 12 (1969), p. 41, para. 79 (5), (6) and p. 42, para. 80 (5). Thus the texts of the legislation and new Constitution were given in the course of the proceedings.

<sup>2</sup> *Ibid.*, p. 42, para. 80 (6).

<sup>3</sup> Committee of Ministers Resolution (56) 16.

<sup>4</sup> On 12 March 1969 the Greek government was invited to submit as soon as possible the complete text of the emergency legislation in so far as it affects the rights guaranteed by Articles 5, 6, 8, 9, 10, 11, 13 and 14 of the Convention and Articles 1 and 3 of the Protocol. The time limit was later extended to 31 May 1968.

<sup>5</sup> *Yearbook*, 12 (1969), p. 43, para. 81 (2).



was entitled to assume that it had complied with Article 15, paragraph 3 and that it was not necessary to send further information'.<sup>1</sup>

Finally, although the Commission did not explicitly deal with the inter-relationship of a breach of Article 15 (3) and reliance on 15 (1), it appeared by implication, on the facts of this case at least, to reject the applicants' argument that non-observance of Article 15 (3) should 'Strike with nullity the derogations made under Article 15 (1)';<sup>2</sup> for it proceeded none the less to a full examination of the Greek legislation in the light of Article 15 (1).

In the applications brought by Ireland against the United Kingdom it was affirmed by the Commission, at the admissibility stage, that it was not necessarily contrary to Article 15 (3) for emergency powers to have come into operation ahead of notification. The United Kingdom explained that notice had not been given before powers under the new Act and Regulations were used—so that the persons aimed at would not 'slip through the net'.<sup>3</sup> The crucial point, asserted the United Kingdom, was that emergency powers were never used save where Article 15 circumstances properly allowed, followed rapidly by notification.

A variation on the earlier arguments relating to the need to specify the breach arose in the *Ireland v. United Kingdom* case. Ireland had contended that the letters of derogation<sup>4</sup> did not contain any reference to the need to discriminate. Although not mentioning Article 5, the letters did speak of the need for new powers of arrest, detention and internment; but there was no reference to Article 14.<sup>5</sup> The United Kingdom thus could not, asserted the Irish Government, rely on its derogations in connection with Ireland's claims under Article 14 of discriminatory treatment of persons. As the Commission found that there was no discrimination under Article 14, it was not necessary for it to pronounce upon the legal consequences of the derogation notices' not having mentioned Article 14.<sup>6</sup>

A different temporal matter relating to Article 15 arose in the *de Becker* case, which concerned an application<sup>7</sup> brought before the Commission on 1 September 1956 by a Belgian national. *de Becker* had in 1946 been found guilty of collaboration with the enemy by the Brussels *Conseil de guerre*. He had during the war used his position as editor of a newspaper to give support to the Germans: The interplay between the subject matter of Article 10<sup>8</sup> and the rights of a State

<sup>1</sup> Ibid., p. 44, para. 86. No doubt Mr. Fawcett's purpose was to encourage the Secretary-General to more rigorous control of notices of derogation under Article 15. See also the Secretary-General's duties under Article 57.

<sup>2</sup> Hearing of January 1968, p. 37; hearing of September 1968, pp. 133–40.

<sup>3</sup> *Yearbook*, 15 (1972), at p. 198; A. 5310/71.

<sup>4</sup> Hearing of 20 August 1971; 29 January 1973; and 27 August 1973.

<sup>5</sup> A. 5310/71, Report of the Commission, adopted 25 January 1976, p. 64.

<sup>6</sup> This writer's view is that, if discrimination were a directly necessary technique in all the circumstances, then reference to the need for it would be a prerequisite of reliance on Article 15. However, if discrimination were to result incidentally, as a result of the measures taken, no specific reference should be required.

<sup>7</sup> A. 214/56.

<sup>8</sup> Article 10 (1) provides: 'Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.'



under Article 15 is well illustrated by the nature of the *Conseil de guerre's* judgment, in which the references to the profession of the applicant and the security of the State are so interlaced. He was found guilty of having 'participated in the enemy's transformation of legal institutions or organizations, of having undermined the loyalty of Belgian citizens to the King and State in time of war' and having 'furthered the enemy's policies and designs'; having 'deliberately directed, practised, incited, promoted, and encouraged propaganda against resistance to the enemy and the enemy's allies . . .' and by his writings having 'incited Belgian nationals to commit the crime of taking up arms against their country' and 'directly, as well as through intermediaries or acting himself as an intermediary, supplied the enemies of the State with troops, and manpower'.<sup>1</sup>

This Judgment of the *Conseil de guerre* carried with it the forfeiture of rights set out in Article 123 *sexies* of the Belgian Penal Code. These—and in particular paragraphs (e), (f) and (g)—placed upon de Becker professional disabilities, including a prohibition upon editing, printing and distributing newspapers or other publications. The Commission declared admissible de Becker's claim that these were incompatible with Article 10 of the Convention.<sup>2</sup>

The Belgian Government made the point that Article 123 *sexies* was not normally, and certainly not currently, applicable in respect of a war situation, which formally ended in Belgium on 15 June 1949. However, the disability imposed for an offence committed in time of war necessarily extended into peacetime. Counsel for Belgium explained:

The restrictive measures of Article 123 *sexies* seem to conform to the provisions of Article 15, with perhaps one special feature that Article 15 does not provide for, namely that this is a measure introduced not after the outbreak of the war but in time of peace, in anticipation of the possible outbreak of war. It is a measure introduced before the Convention came into force, which explained why it was not possible to comply with the provisions of paragraph 3 of the said Article . . .

. . . does Article 15 require all wartime measures to cease automatically to have effect when the war comes to an end? It seems difficult to justify this narrow interpretation . . . Once a penalty has been duly applied under a regulation applicable in wartime only . . . it would not be logical or responsible to hold the view that as soon as the state of war has disappeared the penalty must cease to have effect. That would be to make penalties practically useless in many cases.<sup>3</sup>

The applicant, *per contra*, contended that paragraph 3 of Article 15 made it impossible for the Belgian Government to invoke that Article. It was obliged to withdraw the measure as soon as the need for it had disappeared. Nor had it informed the Council of Europe of the measures it had taken, the reasons there-

<sup>1</sup> *de Becker case, European Court of Human Rights*, Judgment of 27 March 1962, Series A, p. 7.

<sup>2</sup> Finding, after prolonged submissions and analysis, that Articles 2-7 were not here relevant. Although Article 10 (2) may have served to defeat de Becker's claim, the Commission referred an examination of that clause to the merits stage. The qualifications in Article 10 (2) could not be a reason, the Commission made clear, for declaring a *prima facie* claim to be non-admissible: Report of the Commission, Series A, pp. 92-112; and see below, pp. 311-12.

<sup>3</sup> Pleading of 17 March 1959, cited in Report of the Commission, Series A, p. 131.

for, and the period for which they were intended to remain in force. Further, if Article 15 were to be considered as applicable because it refers not only to time of war but also to any 'other public emergency threatening the life of the nation', the Government was still under an obligation to provide the above information.<sup>1</sup> This contention related to the obligations under Article 15 (3), though it did not squarely meet the Government's point about the necessary extension of wartime penalties into peacetime.

The Commission, however, was certain of the incorrectness of the Belgian Government's proposition: it merely stated that Article 15 (3) required measures of derogation to be justified in the circumstances defined in paragraph 1—'with the result that if they remain in force after those circumstances have disappeared they represent a breach of the Convention'.<sup>2</sup> In any event, the Commission thought the reference to Article 15 simply inapplicable in this case, since it could only properly be invoked in war or another public emergency threatening the life of the nation. But the relevant time period designated in the application was that since 14 June 1955, and the Belgian Government had not purported to claim that either war or a public emergency obtained.<sup>3</sup> The Court, when the *de Becker* case came before it, simply noted, with apparent approval, the Commission's views on Article 15.<sup>4</sup>

#### *Other procedural requirements under Article 15*

It now appears to be fairly well established that a claim to derogate under Article 15 cannot serve to render a claim inadmissible. Sometimes the language has been that of 'joining a preliminary objection to the merits of the case'<sup>5</sup> and it seems more correct to view the possibility of a defence under Article 15 as a matter that pertains to the merits. The emergence of this principle has been paralleled in the handling of the *ordre public* clauses of Articles 8–11 at the stage of merits rather than admissibility.<sup>6</sup> In the inter-State application brought by Ireland against the United Kingdom,<sup>7</sup> Ireland had contended that the detailing of the state of emergency by the United Kingdom could have no relevance to the question of admissibility,<sup>8</sup> and could not be considered by the Commission at that stage. The United Kingdom sought to escape the consequences of that doctrine by urging the Commission to distinguish the *Lawless case*. There were special reasons, the United Kingdom urged, why in the *Lawless case* the Commission had joined the examination of Article 15 to the merits; and the Commission had not intended to exclude the possibility of deciding on Article 15 at the admissibility stage in an appropriate case. In this application there had been no dispute between the parties that there was an emergency, and the

<sup>1</sup> Report of the Commission, Series A., p. 132.

<sup>2</sup> *Ibid.*, p. 133.

<sup>3</sup> Series A, p. 135.

<sup>4</sup> See the formulation by the United Kingdom in *Ireland v. United Kingdom*, *Yearbook*, 15 (1972), p. 194.

<sup>5</sup> As in the practice of the International Court of Justice.

<sup>6</sup> *de Becker* case, Judgment of 27 March 1962, Series A, pp. 92–112 (Report of the Commission).

<sup>7</sup> A. 5310/71.

<sup>8</sup> *Yearbook*, 15 (1972), p. 116.



Commission had before it the full facts relating to the powers contained in the Special Powers Act and Regulations, the safeguards against abuse, the practical exercise of the powers and the steps being taken to bring internment to an end. Thus all that could be in dispute, asserted the United Kingdom, was whether these measures went beyond the margin of appreciation allowed to a State in judging what measures were strictly required by the exigencies of the situation; and that was an issue which could be decided at the admissibility stage. The Commission, in finding the applicants' case admissible,<sup>1</sup> chose—one must assume deliberately—not to make a definitive statement on this issue, but rather to tie it to the singular requirements of the relationship between Article 27 and Article 24. The Commission stated:

The Commission recalls that it has consistently held that the provisions of Article 27 (1) and (2) of the Convention refer only to petitions submitted under Article 25 and not to applications made by Governments. In particular, an application under Article 24 cannot be rejected in accordance with paragraph 2 of Article 27 as being manifestly ill-founded and it follows that the question whether such an application is well-founded or not and whether or not there is a consequent breach of the Convention are solely questions relating to the merits of the case. Therefore the effects of derogation made by the respondent Government under Article 15 of the Convention cannot be considered at the present stage of admissibility.<sup>2</sup>

Article 15 (3) requires a Contracting Party to inform the Secretary-General of the Council of Europe when measures in derogation of their obligations have ceased to operate and the provisions of the Convention are again being implemented. Although the Commission has made it clear that the continuation *in practice* of derogations after the strict need for them has ended entails a breach of the Convention,<sup>3</sup> a comparably strict view has not been taken over mere failures to notify the ending of measures in derogation. Thus, the United Kingdom has made three notifications of derogation under Article 15 in respect of Northern Ireland, each representing the introduction of different measures and therefore being more than mere notices of extension. The later measures taken have in fact superseded certain of the earlier measures. The first two derogation notices were, however, never formally withdrawn.<sup>4</sup> There has been no suggestion either by Ireland or by the Commission that this affected the United Kingdom's right to rely on a further derogation.

### *Substantive aspects of Article 15*

#### (a) *Margin of appreciation*

The first consideration by the Convention institutions of Article 15 arose in the inter-State application made by the Greek Government in 1956 against the

<sup>1</sup> The reliance on Article 15 was made by the United Kingdom in response to claims against it under Articles 5, 6, 14 (see below, p. 305); but not in response to claims under Article 3, in respect of which no derogation is permissible.

<sup>2</sup> *Yearbook*, 15 (1972), p. 248.

<sup>3</sup> *de Becker* case, Judgment of 27 March 1962, Series A, p. 131.

<sup>4</sup> I am grateful to Mr. James Fawcett for drawing this fact to my attention.



United Kingdom. That application<sup>1</sup> alleged that legislation passed by the United Kingdom, which provided for whipping and certain collective punishments in Cyprus, was contrary to the Convention. Greece claimed that Article 15 provided no defence, as the measures infringed Article 3, from which no derogation could be made. The United Kingdom, which had made derogations under Article 15 of the Convention in respect of Cyprus,<sup>2</sup> denied that the measures were contrary to Article 3 and claimed that they were permissible because of the 'public emergency threatening the life of the nation' which existed in Cyprus.

Article 15 itself did not in terms specify the extent of the Commission's powers in respect of derogation. Making clear that derogations did not simply remove the matter from their reach, the Commission stated that it was 'competent to pronounce on the existence of a public danger which, under Article 15, would grant to the Contracting Party concerned the right to derogate from the obligations laid down in the Convention'.<sup>3</sup> Merely to claim the existence of an emergency was not enough. Further, the Commission considered that it was 'competent to decide whether measures taken by a party under Article 15 of the Convention had been taken to the extent strictly required by the exigencies of the situation'.<sup>4</sup> It was at this point that the Commission introduced the concept of a 'measure of discretion', which later was to be refined and extended beyond the confines of Article 15. In a phrase the clarity of which left something to be desired, the Commission said 'the Government should be able to exercise a certain measure of discretion in assessing the extent strictly required by the exigencies of the situation'.<sup>5</sup> Subsequent practice has shown that the Commission meant that it would allow a 'margin of appreciation' to a State in assessing *what measures* were strictly required by the exigencies of the situation. Does the notice of the 'margin of appreciation' apply not only to the need for the measures taken, but also to the required precipitating factor, viz., the existence of a public emergency threatening the life of a nation? In his dissenting opinion in the *Greek* case, Mr. Eustathiades reads the statement of the Commission in the *Cyprus* case quoted above as relating to the *existence* of a public emergency: *Yearbook of the European Convention on Human Rights*, 12 (1969), at pp. 107-8. In the *Lawless* case the Commission certainly appeared to be seeking to extend the concept to cover the assessment of the existence of a public emergency: . . . having regard to the high responsibility which a government has to its people to protect them against any threat to the life of the nation, it is evident that a certain discretion—a certain margin of appreciation—must be kept to the Government in

<sup>1</sup> A. 176/56, *Yearbook*, 2 (1958-9), p. 174.

<sup>2</sup> See above, p. 289 n. 5.

<sup>3</sup> *Yearbook*, 2 (1958-9), at p. 174.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*, p. 176. The application was declared admissible on 2 June 1956 and referred to a sub-commission charged with establishing the facts and seeking a friendly settlement of the matter under Articles 28 and 29 of the Convention. As no settlement was reached, the Commission, basing itself on the findings of its subcommission, drew up a report on the merits. This report was never published, and when Greece, Cyprus, Turkey and the United Kingdom reached agreement on the future independent status of Cyprus, the matter was dropped upon the request of the parties concerned.

determining whether there exists a public emergency which threatens the life of the nation and which must be dealt with by exceptional measures derogating from its normal obligations under the Convention.<sup>1</sup>

When the case came before the Court, however, there was no confirmation of the appropriateness of the notice of 'margin of appreciation', *either* so far as the strict need for the measures was concerned *or* so far as the very existence of a public emergency was concerned. The Court made clear that it was for the Court to determine whether the conditions<sup>2</sup> laid down in Article 15 for the 'exceptional right of derogation' had been met; and it did so by a thorough analysis of the conditions prevailing in Ireland, avoiding any reliance on a margin of appreciation by the Irish Government.

In the case brought against Greece by certain other member States, the Commission referred in passing to the notice of the margin of appreciation in the identification of a state of emergency. The Commission stated that the burden of proof lay upon Greece to show that the conditions justifying the invocation of Article 15 have been and continue to be met, 'due regard being had to the "margin of appreciation" which, according to the constant jurisprudence of the Commission the Government has in judging the situation in Greece as from the moment it assumed power on 21st April 1967'.<sup>3</sup> In its opinion on whether there was, on 21 April 1967, a public emergency threatening the life of the nation, the Commission analysed in detail the relevant evidence that had been placed before its subcommission. The Commission gave, without apparent difficulty, a negative answer to the question whether there was actually or imminently such political instability and disorder as would prevent the organized life of the community from being carried on.<sup>4</sup> The idea of a margin of appreciation in assessing the very existence of a public emergency, was, however, invoked more specifically in the dissent of Commission member Mr. Delahaye. Emphasizing the way in which the Commission had to work on a part-time basis, with limited assistance, seeing only a comparatively few witnesses, reliant on the good will of the host government, Mr. Delahaye remarked: 'it follows that the Government concerned and the Commission were not able to base their assessments on the same facts and the Commission's task was therefore

<sup>1</sup> *Lawless case: Publications of the European Court of Human Rights*, Series B, 1960-1, at p. 82 (Report of the Commission). See also the statement by Mr. Waldock (as he then was) on behalf of the Commission: . . . 'the express purpose of Article 15 being to give Governments the necessary authority to take special measures to meet a threat to the life of the nation, that Article must be interpreted as leaving to the Government a reasonable discretion in judging the needs of the situation. It is also clear that a Government is in a better position than the Commission to know the relevant facts and to weigh the various considerations to be taken into account in deciding which of the different possible lines of action to adopt to deal with the emergency. Accordingly, the Commission, in examining measures taken by a Government under Article 15, must allow it a certain margin of appreciation.' (*Report of the Commission*, para. 106, p. 114.)

<sup>2</sup> i.e. whether there was a public emergency threatening the life of the nation; whether the measures taken were strictly required by the exigencies of the situation; and whether these measures were inconsistent with their obligations under international law.

<sup>3</sup> *Yearbook*, 12 (1969), p. 72, para. 154.

<sup>4</sup> *Yearbook*, 12 (1969), Report of the Commission, chapter 1, para. 164, p. 75.



particularly difficult'.<sup>1</sup> As the basis of assessment was not the same for the Commission and the Government which considered itself to be in danger, 'the latter must therefore be granted a margin of appreciation'.<sup>2</sup> This did not exonerate the Commission from an examination of the evidence—but Mr. Delahaye found that evidence inconclusive: 'Under these circumstances the margin of appreciation left to the Government is of particular importance'.<sup>3</sup> Mr. Eustathiades, in his dissenting opinion, saw a clear line of precedent on this question:<sup>4</sup> not only had the Commission spoken of a 'margin of appreciation' for the Government concerned in the *Cyprus* and *Lawless* cases, but this had been implicitly supported by the Court in the *Lawless* case, where it had found that the existence of a public emergency 'was reasonably deduced by the Irish Government from a combination of several factors'.<sup>5</sup> There is a constant counterpoising of two elements, and the balance is not easy. On the one hand, the Commission must not, in the exercise of its functions under Article 15, set itself up as a super-State; on the other hand, it does not suffice that a State has acted reasonably in finding that a public emergency exists. The emergency must exist in fact. This is clear from the Commission's report in the *Greek* case and—notwithstanding the Court's reference to 'reasonable deductions'—it is clear from the Court's own action in examining the facts in the *Lawless* case.

The present significance of the applicability of the notice of margin of appreciation to the question of the very existence of a state of emergency is thus not entirely clear. As there has been no dispute on this point in the *Ireland v. United Kingdom* case,<sup>6</sup> the Court will presumably not elaborate on this matter. In the *Greek* case, the Commission did not elaborate on the previous findings of the Commission that a margin of appreciation existed in respect of whether the measures were strictly required by the exigencies of the situation, because of its negative findings as to the existence of a public emergency.<sup>7</sup> But, again, Mr. Eustathiades relied on margin of appreciation in his dissent on *this* point.<sup>8</sup>

This writer believes that there are good reasons for not embracing the notion of margin of appreciation in regard to the existence of a public emergency, if

<sup>1</sup> Para. 169.

<sup>2</sup> *Ibid.*, para. 174.

<sup>3</sup> *Ibid.*, para. 178.

<sup>4</sup> *Ibid.*, paras. 179–82. A passing reference to the applicability of the 'margin of appreciation' in this context was also made by Mr. Süsterhenn in his dissent: *ibid.*, para. 186.

<sup>5</sup> Judgment of 1 July 1961, p. 56, para. 28. The present writer finds nothing in the Court's judgment in general, or this phrase in particular, that leads to the conclusion Mr. Eustathiades advances. The Court's deliberate silence on this point, and the sentence that refers merely to the data from which the Irish Government made reasonable deductions, seem to lead in a contrary direction. For a supporting view, see Buergenthal, *loc. cit.* (above, p. 291 n. 1), at p. 445.

<sup>6</sup> A. 5310/71.

<sup>7</sup> Although, *obiter*, the Commission did make some pronouncements upon whether in any event certain measures would have been authorized even in such circumstances; it did not further touch on the concept of margin of appreciation. The position of Mr. Eustathiades here may perhaps be contrasted with his comments in the *Lawless* case, where he emphasized that the 'margin of appreciation' cannot mean that a government 'is in a better position to appreciate the circumstances calling for such a measure, [because this] would be tantamount to making a dead letter of the explicit limitation in Article 15': *Lawless* case, Report of the Commission, *Publications of the Court*, Series B, p. 135.

<sup>8</sup> *Yearbook*, 12 (1969), p. 107. The dissenting opinion of Mr. Süsterhenn effectively makes only manifest unreasonableness or arbitrariness beyond the margin of discretion: *ibid.*, p. 88



that phrase amounts to anything more than a mere reminder to the Commission that it may be difficult for it to verify all its facts. But, with that qualification, the question of whether a threat to the life of a nation exists is capable of objective answer. However, one may readily understand that, in choosing between alternative methods to cope with the exigencies of the situation, a margin of appreciation may properly be kept to by a Government in making the choice, provided always that it does not go beyond what is strictly required. Does the phrase, in the context of Article 15, go beyond this? Mr. Waldock (as he then was), in his report in the *Lawless* case, contrasted the use of military tribunals with the use of detention; and after pointing to the undesirable aspects of the former found that, if the choice lay between the two, 'I should myself unhesitatingly find that, in adopting the latter it had not gone beyond the legitimate margin of a government's power of appreciation under Article 15 of the Convention'.<sup>1</sup> Mr. Sørensen, too, thought that the Irish Government had remained 'within its margin of appreciation in finding that the operation of normal judicial processes had been rendered ineffective in cases like that of *Lawless*'.<sup>2</sup> It surely cannot mean that a State is authorized to take measures that *it* deems necessary.<sup>3</sup> The United Kingdom, as respondent in the case brought by Ireland, used the concept of 'margin of appreciation' by way of drawing a contrast between measures justified by the exigencies of the situation and those necessary if those responsible for directing and planning the terrorist acts were to be apprehended: the latter were permissible by virtue of the margin of appreciation which a threatened State had.<sup>4</sup> The United Kingdom made a further point: 'that the margin of appreciation as to the means adopted for giving effect to a particular measure provided an even greater degree of discretion than that accorded to the choice of the measure itself. . .'.<sup>5</sup> What the needed powers of a government under threat were, 'required decision by a government which based that decision on its knowledge of local circumstances, on its experience in governing that part of its domain, and it made that decision in the light of its intelligence and security reports. Any government is said to have a margin of appreciation in dealing with its own security situation.'<sup>6</sup> For its part, the Government of Ireland thought that the concept of margin of appreciation was not so generous as the United Kingdom had suggested. It was still for the Commission to decide both whether the level of intimidation which was invoked existed and whether or not the powers were strictly necessary: in particular, there was nothing about the notion of 'margin of appreciation' which simply allowed the Commission to rely on the Diplock Report.<sup>7</sup> Significantly, the Commission in its report did not in terms allude to the 'margin of appreciation'. Dealing with

<sup>1</sup> But see the singular equation of this concept with such an authorization in Article 1 (2) of the First Protocol: 'The notion of a margin of appreciation is to be found expressed in only one provision of the Convention, Article 1 (2) of the Protocol, under which a State may take certain measures which "it deems necessary"': Fawcett, *The Application of the European Convention on Human Rights*, p. 248.

<sup>2</sup> *Lawless* case, Series B, p. 118.

<sup>3</sup> *Ibid.*, p. 131.

<sup>4</sup> *Ireland v. United Kingdom*, Report of the Commission of 25 January 1976, p. 60.

<sup>5</sup> *Ibid.*, p. 60.

<sup>6</sup> *Ibid.*, at p. 63.

<sup>7</sup> *Ibid.*, at p. 68.

the allegations of infringements of Articles 5 and 6, the Commission said that it was for the State facing the emergency 'to choose its means and prescribe its safeguards against abuse, subject to the terms of Article 15 and the control machinery of the Convention': but this was by way of stating that the provisions against abuse which had been acceptable in the *Lawless* case were not necessarily required in the present circumstances.

(b) *The textual provisions of Article 15 (1)*<sup>1</sup>

(i) *The existence of a state of war or public emergency.* Leaving aside the notion of margin of appreciation, the institutions of the Convention have made clear the requirements of Article 15 (1). Derogations may only take place in time of war or other public emergency threatening the life of a nation. In the *Cyprus* case the Commission had declared itself competent to pronounce on the existence or otherwise of a public danger.<sup>2</sup> In the *Lawless* case the Court thought the 'natural and customary meaning' of the words of Article 15 (1) sufficiently clear: 'they refer to an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organized life of the community of which the State is composed'.<sup>3</sup> The Court then proceeded to affirm the reasonableness of the Irish Government's deduction that there was such an emergency, resting on a continuation of certain factors: the existence of a secret army using violence and engaged in unconstitutional activities; the fact that this army was operating outside the Republic and jeopardizing the Republic's relations with its neighbour; and the 'steady and alarming increase in terrorist activities'<sup>4</sup> during the relevant period.

In the *Greek* case the Commission examined the criteria relied on by the respondent Government in invoking Article 15, and made the point that, in classifying the situation on 21 April 1967, the Greek Government was entitled to take into account the situation which existed before that date.<sup>5</sup> Citing the definitions of 'a public emergency threatening the life of the nation' given by the Court in the *Lawless* case, the Commission noted that the French text (which was authentic) contained the notion of imminent danger: 'Une situation de crise ou de danger exceptionnel *et imminente* qui affecte l'ensemble de la population...'.<sup>6</sup> The Commission stated that the following elements were thus required: (1) an actual or imminent emergency; (2) involving the whole nation; (3) threatening the continuance of the organized life of the community; (4) the normal measures or restrictions permitted by the Convention for the maintenance of public safety, health and order being inadequate.<sup>7</sup> The Commission then examined in detail the facts which had been made available to it, and,

<sup>1</sup> For an interesting general survey, see Velu, loc. cit. (above, p. 289 n. 2).

<sup>2</sup> *Yearbook*, 2 (1958-9), p. 176.

<sup>3</sup> *Lawless case (Merits)*, Judgment of 1 July 1961, *Publications of the European Court of Human Rights*, Series A, p. 56.

<sup>4</sup> *Ibid.*, p. 56, para. 28.

<sup>5</sup> Report of the Commission, *Yearbook*, 12 (1969), p. 45, para. 88.

<sup>6</sup> *Lawless case (Merits)*, Judgment of 1 July 1961, para. 28.

<sup>7</sup> *Yearbook*, 12 (1969), p. 72, para. 153.



testing them against these criteria, found that there was not a crisis or state of emergency within the meaning of Article 15.

In the *Ireland v. United Kingdom* case there was no dispute between the parties as to the existence of a state of emergency. This in itself is not uninteresting. If Northern Ireland is viewed constitutionally as an integral part of the United Kingdom, it is very hard to see that the situation really threatens the life of the whole nation. The reality seems to be that, for purposes of Article 15, 'the whole nation' is simply Northern Ireland. Instead, the dispute turned on the appropriateness of the measures taken in Northern Ireland by the United Kingdom, and whether interrogation techniques were contrary to Article 3, from which no derogation is possible.

Only in the *de Becker* case has the existence of a state of 'war' been relevant: in that case, the measures were taken in relation to wartime events, though their effect continued into peacetime. It remains to be seen how far the Commission will in the future need to develop its jurisprudence on the precise meaning to be given to a 'state of war', because the party invoking Article 15 may always rely, in the alternative, on a state of public emergency.

(ii) *The assessment of measures in derogation as being 'strictly required by the exigencies of the situation'*. The *Lawless* case provided the first detailed treatment of this requirement.<sup>1</sup> Lawless contended that even if the situation in 1957 was such as to justify derogation from obligations under the Convention, the bringing into operation and the enforcement of Part II of the Offences against the State (Amendment) Act 1940 was disproportionate to the strict requirements of the situation. The Commission decided, by the narrow majority of 8 votes to 6, that the measures of arrest and detention were justified. The various members of the Commission wrote individual opinions on this point. Mr. Waldock (as he then was) observed that the activities of the Irish Republican Army (I.R.A.) were directed not against the Republic itself, but against the (as he carefully phrased it) 'neighbouring territory of the Six Counties'.<sup>2</sup> In those circumstances, the Commission had a particular need to be satisfied that the normal processes of law and order were not reasonably sufficient to deal with the situation.<sup>3</sup> Mr. Waldock found significant the tacit sympathy that many involved in the processes of law would have with the aims, if not with the methods, of the applicant. Pointing to the intimidation of witnesses and other factors, he found that special measures were justified. But could not these have been special military courts or tribunals sitting in secret and applying different rules of evidence from those normally used? Mr. Waldock thought that this

is not a procedure which is demonstrably to be preferred to the procedure of detention without trial subject to safeguards. Not only is the trial and conviction of persons by secret military tribunals a procedure which is itself open to serious objection under the

<sup>1</sup> The Report of the Commission in respect of the Greek complaint against the United Kingdom, regarding Cyprus, was not published; and in the *de Becker* case the Commission found Article 15 to be inapplicable.

<sup>2</sup> *Lawless* case, Series B, p. 114.

<sup>3</sup> Though, interestingly, the Commission found that the Irish Government was 'entitled to give substantial weight to its obligation under international law to prevent its territory from being used as a base for attacks upon a neighbouring territory': *ibid.*, Series B, at p. 88.



Convention on grounds of principle, but it is also a procedure that in numerous cases may result in the conviction of persons on charges of the utmost gravity entailing the most serious consequences . . .<sup>1</sup>

Not only did the Commission consider the alternative methods that might have been available to the Irish Government, but it also examined in considerable detail whether the measures selected had built into them sufficient safeguards against abuse. The Act of 1940 in fact contained substantial safeguards, including the establishment of a Detentions Commission and the requirement to make twice-yearly reports to the two Houses of Parliament. Waldock also found significant the undertaking by the Prime Minister to release any detainee who gave an undertaking to respect the Constitution and not to engage in illegal activities: though this had no legal basis its significance could not be overlooked in a parliamentary democracy.<sup>2</sup>

Some of those dissenting—and notably Mr. Eustathiades—found particularly significant the fact that the law in Ireland already provided for cases where, for one reason or another, normal courts were considered insufficient. The existence of these provisions ‘proves convincingly that detention without trial is not “strictly required by the exigencies of the situation”’.<sup>3</sup> Nor was Mr. Eustathiades convinced that the safeguards against abuse were satisfactory: the detainee had no right to inquire into the grounds on which the Minister was of the opinion (as required by the 1940 Act) that he had engaged in activities prejudicial to the State; no appeal could lie against a Ministerial order for arrest and detention; and the Detention Commission could only release him if there were no reasonable grounds for detention (‘which is by no means synonymous with reasonable grounds for conviction’).<sup>4</sup>

The Court, however, held unanimously that the detention of Lawless was founded on the right of derogation properly exercised under Article 15. Its judgment does not in terms make it clear why it prefers the majority to the minority view in the Commission. So far as concerned the measures being those strictly needed by the exigencies of the situation, the Court briefly observed that the ordinary laws had been unable to deal with the situation, and that even the special criminal and military courts could not do so. The fact that the I.R.A. operated across the border was an impediment to the gathering of information. The Court was silent on any other legal relevance of the violent acts being directed outside of the Republic; nor did it speak of the margin of appreciation in the decision of the Irish Government that detention, rather than special criminal courts, was needed.

As for safeguards from abuses, the Court thought it significant that the application of the Act was subject to constant supervision by Parliament, which could annul the Proclamation by which it came into force. The Court was also favourably impressed by the declaration of the Government that detainees undertaking not to engage in illegal activities would be released.<sup>5</sup>

<sup>1</sup> *Lawless case*, Series B, p. 118.

<sup>2</sup> *Ibid.*, p. 124.

<sup>3</sup> *Ibid.*, p. 139.

<sup>4</sup> *Ibid.*, p. 140.

<sup>5</sup> *Lawless case*, Judgment of 1 July 1961, pp. 56–8.

In the case of *Ireland v. United Kingdom* the applicant State had claimed that comparable protection against abuse was not forthcoming. How central was parliamentary control to a finding that the measures did not go beyond those required by the exigencies of the situation? The Commission stated, in an important passage:

The Commission does not, however, consider that it follows from this [i.e. the *Lawless*] judgment that exactly these or similar safeguards—e.g. parliamentary control—are necessarily required in any other emergency, let alone the one in the present case. The State facing the emergency must choose the means and prescribe its safeguards against abuse, subject to the terms of Article 15 and the control machinery of the Convention.<sup>1</sup>

This seems, with respect, to be circular in its reasoning. If the choice by the State is to remain (only) subject to the control machinery of the Convention, *how* important is parliamentary control over derogation measures under the Convention? In what circumstances should such measures be regarded as important, and in what circumstances (if at all) unimportant? Merely to state that any given set of measures to control abuse may vary from case to case so long as it complies with Article 15 and the control machinery of the Convention does little to clarify the legal limits.

However, there is no problem in accepting the Commission's view that an improvement in procedures does not necessarily indicate the inadequacy of the original procedures. Reasons of policy support this. The Irish Government contended that improvements in administrative procedures necessarily meant that the original procedures fell short of what was absolutely necessary under the circumstances. Sidestepping the point of logic, the Commission stated that: 'Experience must allow improvements to be made by a Government without its afterwards being held guilty of having violated the Convention. Otherwise this possibility might even conceivably impede the improvement of the safeguards as experience was gained.'<sup>2</sup> One must presumably conclude, therefore, that measures must be strictly required by the exigencies of the situation as it is reasonably judged, in the view of the Commission, at the time.

The United Kingdom claimed in this case that, if administrative detention had been lawful under Article 15 in Ireland at the time of the *Lawless* case, *a fortiori* was it justifiable in Northern Ireland now. Although agreeing that the burden of proof lay on it to show that the requirements of Article 15 were fulfilled, the United Kingdom contended that the existence of adequate safeguards was clear, in the form of the establishment of an Advisory Committee, flexible administration of the detention system, and the deliberate phasing out of internment.<sup>3</sup> Ireland, for its part, contended that the Commission had to decide whether the exigencies of the situation required the measures that were taken in respect to arrest, detention and internment during three identified phases of the recent history in Northern Ireland. There were three tests for the Com-

<sup>1</sup> *Ireland v. United Kingdom*, A. 5310/71. Report of the Commission adopted 25 January 1976, at p. 101.

<sup>2</sup> *Ibid.*, p. 102.

<sup>3</sup> *Ibid.*, p. 63.



mission: whether the reasons given by the United Kingdom for the assertion of extrajudicial powers were justified; if so, whether the powers operated were those required by the exigencies of the situation; and if so, whether there were adequate safeguards. This formulation of the tests would seem to be correct. As to whether the measures were needed, the Irish Government claimed that the United Kingdom's reference to difficulties due to the escape of terrorists over the border could not be relevant.<sup>1</sup> It may be noted that the Commission, in its report, specifically found this an important factor in declaring the measures justified under Article 15.<sup>2</sup>

So far as the question of adequate safeguards was concerned, the Irish Government complained in particular that the legislation did not provide for the non-admissibility of evidence obtained under torture, and indeed that there was no way of knowing whether torture had been used. Nor was there legal authority to cross-examine in hearings before the Advisory Committee (though in practice the right to cross-examine was allowed).<sup>3</sup> The Commission, finding that the powers exercised by the United Kingdom were not in conformity with Article 5 of the Convention,<sup>4</sup> examined whether they could none the less be justified under Article 15 of the Convention. The Commission noted that the applicability of Article 15 does not automatically flow from a high level of violence. It had to be shown that the normal functioning of the community and the administration of law was affected. Even then, the obligations of the Convention do not entirely disappear—they can be suspended or modified only to the extent strictly required under Article 15. And it is in that context that the Commission looks for safeguards against abuse or excessive use of emergency measures.<sup>5</sup> In the present case, the Commission accepted that Article 15 permitted the measures to be brought into operation.<sup>6</sup> The Commission further found that, given the serious increase in violence in the relevant time period, the arrest operation as a whole was justified. The safeguards, and the methods in which they had been operated, were adequate, and the improvements that had been made in turn showed only that the United Kingdom Government 'has exercised its discretion in a responsible way, and on the basis of the experience it has gained'.<sup>7</sup> The Commission held unanimously that the measures in derogation of Article 5 were, at each place of the legislation concerned, measures strictly required by the exigencies of the situation within the meaning of Article 15 (1).

(iii) *Consistency with their obligations under international law.* The requirement that otherwise lawful measures of derogation by a State shall be allowed 'provided that such measures are not inconsistent with its other obligations under international law' has generated virtually no jurisprudence in the organs of the Convention. In the *Lawless* case neither the Commission nor the Irish Government referred to this. The Court none the less declared that, *proprio motu*, it

<sup>1</sup> *Ibid.*, p. 64; the United Kingdom had also emphasized the intimidation of witnesses, and the need for extrajudicial remedies to apprehend those engaged in planning and directing terrorist operations.

<sup>2</sup> *Ibid.*, p. 99.

<sup>3</sup> *Ibid.*, p. 68.

<sup>4</sup> *Ibid.*, pp. 88–90. The Commission found Article 6 to be inapplicable to the claim.

<sup>5</sup> *Ibid.*, p. 97.

<sup>6</sup> *Ibid.*, p. 98.

<sup>7</sup> *Ibid.*, p. 102.



should determine whether the condition had been fulfilled: and found it had.<sup>1</sup> Again, in the *Greek* case, no submissions were made on this point by the applicants. The Commission, having failed to find to its satisfaction the existence of a public emergency threatening the life of the nation, stated that it was thus not called upon to state a view on whether the derogations were consistent with Greece's other obligations under international law. This element in Article 15 may prove more important in the future, now that the two United Nations Covenants have entered into force. Although the derogation provisions are in many respects similar, one can envisage circumstances in which it will be possible for an applicant to claim that a derogation under Article 15 is contrary to the respondent State's treaty obligations under the Covenant.<sup>2</sup>

(iv) *Forbidden derogations.* Article 15 (2) provides that there shall be no derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (1) or 7. While there has been no jurisprudence under Article 15 (2), one learned author makes the point that, since Articles 2 and 7 themselves contain certain qualifications, 'the inference could be drawn that the only rights under the Convention which can strictly be described as fundamental and inalienable are those guaranteed by Articles 3 and 4 (1)'.<sup>3</sup>

(c) *The availability of the provisions of Article 15 to a revolutionary government*

This question arose in the *Greek* case. Interestingly, it arose in the context of an assertion made not by the applicants, but by the respondent Government, which contested the competence of the Commission on the grounds that it could not control the actions by which a revolutionary government maintained itself in power.<sup>4</sup> The Greek Government contended that a revolution made meaningless the criteria of Article 15. The respondent Government also took the separate point that the form of the government concerned, and in particular whether or not it was democratic, was a domestic question and irrelevant to Article 15.<sup>5</sup> Although the applicants agreed that the Commission was not called upon to state an opinion on the revolution in Greece, a revolutionary government could not invoke an 'emergency situation, which they themselves created, as a justification for derogating from the Articles of the Convention in order to

<sup>1</sup> *Lawless* case, Judgment of 1 July 1961, Series A, p. 60, para. 40.

<sup>2</sup> On the compatibility of the U.N. Covenants with the European Convention, see Tardu, 'Coexistence des procédures universelles et régionales de plainte individuelle dans la domaine des droits de l'homme', *Human Rights Journal*, 4 (1971), pp. 589-625; Robertson, 'The United Nations Covenant on Civil and Political Rights and the European Convention on Human Rights', this *Year Book*, 43 (1968-9), pp. 21-48.

<sup>3</sup> Fawcett, *Application of the European Convention on Human Rights*, p. 250. Article 2 guarantees the protection by law of the right to life. The qualifications include execution following sentence of a court for a crime for which this is the penalty prescribed by law; defence by a person against unlawful violence; the effecting of a lawful arrest or the preventing of a lawful detention; the lawful quelling of a riot or insurrection. Article 7 prohibits retrospective criminal penalties. The qualification relates to the trial and punishment of a person for an act or omission which was recognized at the time to be criminal according to the general principles of law recognized by civilized nations. Article 3 forbids torture, inhuman or degrading treatment or punishment; and Article 4 (1) states that no one shall be held in slavery or servitude.

<sup>4</sup> Observations of 16 December 1967, cited in *Yearbook*, 12 (1969), p. 31, para. 56.

<sup>5</sup> Hearing of September 1968, pp. 270, 279.

remain in power'.<sup>1</sup> After the Commission declared the applications inadmissible, the applicants further argued that Article 15 was designed to protect democratic governments and democratic institutions.<sup>2</sup> They agreed that the respondent Government fell into the category of revolutionary acts against which the constitutional government was entitled to protect itself under Article 15. The Commission, in two paragraphs adopted by a majority of ten members, simply stated its competence to examine the acts of governments even after revolutions. The revolution did not deprive Greece of its rights or absolve it of its obligations under the Convention. If the conditions of Article 15 were met, the Greek Government would be entitled to act under that Article.<sup>3</sup>

## B. ACCOMMODATIONS

Qualifying clauses in other Articles of the European Convention on Human Rights also allow contracting parties to derogate from obligations otherwise incumbent upon them. What is meant here is not *interpretative* clauses, which indicate certain events which shall not be regarded as within the scope of the obligations,<sup>4</sup> but those clauses which excuse States, in certain designated circumstances, from acts that would otherwise be in breach of the Convention. One may note particularly the following in the Convention itself:

(1) Article 6 entitles everyone to a fair and public hearing, in the determination of his civil rights and obligations or of any criminal charge, by an independent and impartial tribunal established by law. Article 6 continues:

Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require; or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

Certain aspects of this clause may be regarded as interpretative; for the purposes of this study our interest lies in the reference to 'morals, public order, or national security in a democratic society'.

(2) Article 8 guarantees respect for private and family life, home and correspondence. Paragraph 2 continues:

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

(3) Article 9 guarantees the right to freedom of thought, conscience and religion. Paragraph 2 stipulates:

Freedom to manifest one's religion or beliefs shall be subject only to such limitations

<sup>1</sup> Hearing of September 1968, p. 155.

<sup>2</sup> Memorial of 25 March 1968, pp. 77-9; hearing of September 1968, pp. 153 and 266.

<sup>3</sup> Report of the Commission, *Yearbook*, 12 (1969), pp. 32-3, paras. 60-1.

<sup>4</sup> For example, para. 2 of Article 2; para. 3 of Article 4.



as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

(4) Article 10 prescribes the right to freedom of expression, and contains its own interpretative clause, viz., that States shall none the less not be prevented from requiring the licensing of broadcasting, television or cinema. Paragraph 2 continues:

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

(5) Article 11 guarantees the right to freedom of peaceful assembly and association, including the right to join and form trade unions. Paragraph 2 stipulates:

No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.<sup>1</sup>

In addition, there are certain comparable clauses in two of the four protocols to the Convention.

(6) Article 1 of Protocol No. 1<sup>2</sup> provides that every national or legal person is entitled to the peaceful enjoyment of his possessions. Article 1 goes on to state that no one shall be deprived of his possessions 'except in the public interest and subject to the conditions provided for by law and by the general principles of international law', and the second (interpretation) paragraph makes it clear that the general obligation shall not impair the rights of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other compensations or penalties. The qualifying phrase here is perhaps not so much to be regarded as an '*ordre public*' clause in the normal sense, as a restatement of the international law requirement that a taking of property be for a public purpose and subject to certain conditions.<sup>3</sup> Indeed, the Commission has taken the reference

<sup>1</sup> The ambiguity of the last sentence of paragraph 2 is unfortunately matched by the French text. It is clear, however, both from practice and from, e.g., the formulation of the European Social Charter, that members of the armed forces, etc., are intended to be the objects and not the subjects of the qualification expressed.

<sup>2</sup> Which adds these additional rights to those protected by the Convention.

<sup>3</sup> These conditions have been undergoing substantial change over the past few years, and there are many who, while regarding non-discrimination, public purpose and compensation as essential conditions, regard the old compensation standard of 'adequate, proper and effective' as dead: see, for example, Lillich, *The Valuation of Nationalized Property*, vols. 1-3.



to international law to require it not to allow this condition to be invoked by an applicant against a contracting State of which he is a national.<sup>1</sup>

(7) Under Protocol No. 4, Article 2 provides for freedom of movement within a country for a lawful resident, and freedom to leave any country, including one's own. Paragraph 3 states:

No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of *ordre public*, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

It is obviously beyond the scope of this Article to provide a detailed examination of the jurisprudence under Articles 6, 8–11 and Protocols 1 and 4. Nor does space allow a survey, in general terms, of the practice under the qualifying clauses. However, certain comments on what we may term the public interest/state security/*ordre public* aspects of the clauses indicated above are called for.

The express limitations to Article 6 are very widely drawn.<sup>2</sup> The exclusion of the press and public may be justified on a variety of grounds. There has been no instructive jurisprudence on the scope, in the context of Article 6, of reasons of 'public order or national security in a democratic society'. So far as this latter phrase is concerned, although it has not been in issue in the context of Article 6, the Commission has, in those instances in other articles<sup>3</sup> where it has arisen,<sup>4</sup> made use of a comparative survey of the practice of member States, the better to identify whether a restriction is 'necessary in a democratic society'.

In the context of Article 8 the case of *Klass v. Federal Republic of Germany* throws some light on the matter. Here a lawyer for the Baader-Meinhof group claimed that privacy of his mail had been violated by amendments to the Basic

<sup>1</sup> See *Yearbook*, 3 (1960), p. 422; and support in the *travaux préparatoires*: CM/WP (51) 3, 11, 20, 21, 29. See also *Collection of Decisions of the European Commission of Human Rights*, vol. 18, A. 1870/63.

<sup>2</sup> This point is heavily emphasized by Fawcett in his treatment of Article 6. See *op. cit.* (above, p. 306 n. 3), at pp. 149–52. He contrasts the breadth of the derogations in Article 6 with the exceptions listed as punishable by Lord Shaw of Dunfermline in *Scott v. Scott*, [1913] A.C. 417 ('a thunderous judgment'): suits affecting wards, lunacy proceedings and suits—such as those involving trade secrets—where secrecy is of the essence. Conceding that these may perhaps be too narrowly drawn, Fawcett none the less is clearly anxious about the 'large and loosely expressed' exceptions of Article 6 (1). He points out, in particular, that it is difficult to imagine in what 'special circumstances' not already covered by other wide exceptions, a court might think that it was 'strictly necessary' to prevent publicity from prejudicing the interests of justice (p. 150). He wonders further whether 'public order' simply refers to the court and its precincts, or 'some vaster concept of public policy'. Both the placing of 'public order' in the text ahead of the discretion given to the court in relation to the prejudice of justice, and the use attributed to that phrase in other articles, lead the present author to feel that it is 'some vaster concept of public policy' that is here being referred to. This is confirmed by the case of *Engel and Others* by the Court in its judgment of 8 June 1976, at p. 34.

<sup>3</sup> The phrase 'necessary in a democratic society' also occurs in Articles 8 (2) to 11 (2) and Article 2 (3) of the Fourth Protocol.

<sup>4</sup> See, for example, the summary of vagrancy laws in the member States, which appears as Appendix IV of the Commission's Report in the *Vagrancy* cases: *Publications of the Court*, Series B, p. 143. For comments, see also Jacobs, *op. cit.* (above, p. 288 n. 4), at p. 197.

Law which allowed the authorities to control the correspondence and communications of the group. The Government of Germany claimed that the restrictions were pursuant to a law. Conceding that it followed from the concept of necessity that the interference must be proportionate to the danger threatened, the Government pointed out that the supervisory measures could not be initiated blindly but only if there was a factual basis for suspecting that important State legal interests were threatened. The German Government also suggested that the reference in Article 8 (2) to 'democratic society' means that the information gathered is not to be used for 'alien purposes', for example, for discovering a person's political opinions. The claim of the applicants was declared admissible.<sup>1</sup>

The exceptions clauses of Article 8 have been very widely interpreted.<sup>2</sup> Those concerning the prevention of disorder and crime, protection of health and morals, and protection of the rights and freedoms of others, have been most widely relied on, and the need has not been felt to rely on the proviso of national security.<sup>3</sup>

The exceptions clause of Article 9 is cast somewhat more narrowly, though very wide claims have been made under Article 9 itself.<sup>4</sup> There has been virtually no practice of significance in the areas of Article 9 (2)—the public order exception—that interests us here.<sup>5</sup> Such cases as there have been have related to the concern of governments in multi-religious States that public order might be

<sup>1</sup> *Yearbook*, 17 (1974), p. 178, A. 5029/71.

<sup>2</sup> Thus, the treatment of homosexual intercourse as a penal offence has been considered permissible under Article 8 (2): *Yearbook*, 1 (1955-7), p. 228, A. 104/55; *ibid.*, p. 235, A. 530/59; *Yearbook*, 3 (1960), p. 184, A. 704/60. The searching of a house and seizure of documents therein, as part of an inquiry into a criminal offence, have also been held justified under Article 8 (2): *Yearbook*, 3 (1960), p. 184, A. 1216/61; *Collection of Decisions of the European Commission of Human Rights*, vol. 11, p. 1, A. 3448/67. For refusals of visas or residence permits to a partner of a marriage, on grounds that a serious offence had been committed within the terms of Article 8 (2), see, *inter alia*, *Yearbook*, 1 (1955-7), p. 205, A. 238/56; *Yearbook*, 8 (1965), p. 200, A. 2535/65; *Collection of Decisions, etc.*, vol. 17, p. 28, A. 299/66; *Yearbook*, 13 (1970), p. 674, A. 4478/70, A. 4486/70, A. 4501/70; *Yearbook*, 15 (1972), p. 564, A. 5445/72. There has also been a cluster of decisions relating to the rights of prisoners in respect of their private and family lives, where issues under Article 8 (2) have arisen: see, for example, *Yearbook*, 15 (1972), p. 370, A. 4623/70; *Collection of Decisions, etc.*, vol. 42, p. 140, A. 5229/71; *Yearbook*, 3 (1960), p. 184, A. 530/59; *Yearbook*, 8 (1965), p. 174, A. 1753/63; *ibid.*, p. 228, A. 1983/63; *Yearbook*, 9 (1966), p. 436, A. 2516/65; *Collection of Decisions, etc.*, vol. 22, p. 35, A. 2566/65. In the last five cases Article 8 (2) was invoked as the basis for control of prisoners' correspondence; on other occasions it has been dealt with as a 'natural consequence of imprisonment': *Yearbook*, 3 (1960), p. 272, A. 646/58; *Yearbook*, 13 (1970), p. 720, A. 4101/69. Compare these with the unanimous rejection by the Court of the Home Secretary's claim under Article 8 (2), regarding the correspondence of a prisoner with his lawyer: *Golder case*, *Publications of the Court*, Series A. Administrative inconvenience is not enough to bring Article 8 (2) into operation.

<sup>3</sup> For a detailed survey of Article 8, see Jacobs, *The European Convention on Human Rights*, pp. 125-43; Fawcett, *Application of the European Convention on Human Rights*, pp. 185-97. For an extremely useful compendium of citations and brief comment on the case law throughout the Convention, see *Human Rights Journal*, 8 (1975), p. 450.

<sup>4</sup> See the claim in some of the *Belgian Linguistic* cases that the obligation to have school education in a language other than that of the family was a breach of the rights of freedom of thought and conscience: *Yearbook*, 6 (1963), p. 332, A. 1474/62; *Yearbook*, 6 (1963), p. 444, A. 1769/62; *Yearbook*, 11 (1968), p. 228, A. 2333/64.

<sup>5</sup> For an examination of the *travaux préparatoires* on the drafting of Article 9 (2), see Fawcett, *op. cit.* (above, p. 306 n. 3), pp. 198-9.



infringed if one religious group was too flagrant in the exercise of its freedoms. Thus the Netherlands Supreme Court felt that it was justified in applying Article 9 (2), in preventing the holding of religious services on the public highway, to prevent 'tension, agitation and disorder'.<sup>1</sup>

Article 10 (2) prescribes exceptions to the right of freedom of expression. Those relating to the army and the civil service are of particular significance to us. The Commission accepted that action taken against a person who had published defamatory articles on the army was justified under Article 10 (2) (though the emphasis was on 'the reputation of others' rather than 'the interests of public security').<sup>2</sup> The difficulty of drawing the line is well illustrated by the case of *Engel and Others (Dutch Soldiers case)*. The Commission had found admissible a claim by Dutch soldiers who had been punished for publishing a certain newspaper article and participating in a demonstration on behalf of a radical political organization.<sup>3</sup> The issue was referred to the Court. Finding that, in the case of Plaintiffs Dona and Schul, the disputed penalty undoubtedly was an interference with their rights under Article 10 (1), the Court proceeded to see if it could be justified under 10 (2). The penalty was authorized by statute, and was thus 'prescribed by law' within the meaning of Article 10 (2). The Court further found that the measures were those necessary in a democratic society for the prevention of disorder. Making an important comparison with the 'regular' public order clauses of exceptions in other Articles, the Court said:

The Court firstly emphasizes, like the Government and the Commission, that the concept of 'order' as envisaged by this provision refers not only to public order or 'ordre public' within the meaning of Article 6 (1) and 9 (2) of the Convention and Article 2 (3) of Protocol No. 4; it also covers the order that must prevail within the confines of a special social group. . . . It follows that the disputed penalties met this condition of and to the extent that their purpose was the prevention of disorder within the Netherland armed forces.<sup>4</sup>

The Court also rejected the view that under Article 10 (2) 'prevention of disorder' means only 'prevention of crime'. Are servicemen being denied freedom of expression under Article 10? The Court insisted that they, too, had this right:

However, the proper functioning of an army is hardly imaginable without legal rules designed to prevent servicemen from undermining military discipline, for example by writings.<sup>5</sup>

The argument of national security has been successfully invoked by a respondent Government which had imposed restrictions to prevent a civil servant from revealing official secrets. The Commission found this acceptable under Article 10 (2).<sup>6</sup>

In the *de Becker* case, however, the Commission thought<sup>7</sup> the application of

<sup>1</sup> Hoge Raad: *Yearbook*, 4 (1964), p. 646.

<sup>2</sup> *Yearbook*, 3 (1963), p. 310, A. 753/60.

<sup>3</sup> *Yearbook*, 15 (1972), p. 508, A. 5370/72.

<sup>4</sup> Judgment of 8 June 1976, at p. 34.

<sup>5</sup> *Yearbook*, 13 (1970), p. 888, A. 4274/69.

<sup>6</sup> *Yearbook*, 2 (1958-9), p. 214; *de Becker case*, *Publications of the Court*, Series A.

<sup>5</sup> *Ibid.*, p. 34.



Article 10 (2) went too far, as de Becker (who had been found guilty of collaboration with the Nazis) was forbidden not only from editing, writing or publishing in the area of public affairs (and the implication was that the Commission might have found this justified), but from editing, writing or publishing at all. The Commission was surely correct in being concerned about the lack of a *nexus* between the penalty and the ground for the derogation.

Bringing together the concepts of public order and what is 'necessary in a democratic society', the Commission observed that when deprivation of freedom of expression in regard to non-political matters is imposed

... inflexibly for life without any provision for its relaxation when with the passage of time public morale and public order have been re-established and the continued imposition of that particular incapacity has ceased to be a measure 'necessary in a democratic society' [it ceases to fall] within the meaning of Article 10, paragraph 2 of the Convention.<sup>1</sup>

Although the matter went to the Court, it was withdrawn before judgment on the merits, when the relevant Belgian legislation was substantially amended.

It may also be noted that the Commission found that press censorship in Greece which forbade criticism of the military junta was not justified under Article 10 (2).<sup>2</sup>

Issues under Article 11 (2) have not arisen within the terms of reference of this article.<sup>3</sup>

We have noted that Article 1 of the First Protocol makes reference to 'the public interest': the Commission has from time to time had to decide whether measures fall within this category. Tentatively, this task raises problems about the ability of an independent tribunal to pass on the question what is in the public interest,<sup>4</sup> though we have already suggested that the phrase here must be given a particular meaning in the context of the international law requirements for a lawful taking of property.<sup>5</sup>

The Fourth Protocol, Article 2, has not yet given rise to relevant jurisprudence in respect of the accommodation clause, though one can easily imagine that this is a field ripe for litigation.<sup>6</sup>

<sup>1</sup> *Yearbook*, 5 (1962) at p. 326.

<sup>2</sup> *Yearbook*, 12 (1969), p. 164.

<sup>3</sup> Questions relating to Article 11 (2) have arisen in the context of trade union rights: see *Collection of Decisions of the European Commission of Human Rights*, vol. 42, p. 30, A. 5614/72; *ibid.*, vol. 39, p. 26, A. 4464/70; and discussion in Jacobs, *The European Convention on Human Rights*, pp. 158-61. Fawcett points out (*Application of the European Convention on Human Rights*, p. 223) that Article 11 is identical with Article 22 of the Covenant on Civil and Political Rights save that in the latter 'public order' appears in the place of 'the prevention of disorder or crime'; and the reference to 'the administration of the State' at the end of Article 11 is omitted.

<sup>4</sup> *Yearbook*, 3 (1960), p. 422, A. 511/59.

<sup>5</sup> See above, p. 308.

<sup>6</sup> Compare Article 2 of the Fourth Protocol with Article 13 (1) and (2) of the Universal Declaration of Human Rights; and Articles 12 and 13 of the U.N. Covenant on Civil and Political Rights. Article 3 of the Fourth Protocol deals separately with a person's right to return to his own country. For relevant surveys of international law in this area see Chen, 'Expulsion and Repatriation in International Law: the right to leave, to stay and to return', *Proceedings of the*

These 'accommodation' clauses of the European Convention and its protocols have also, it must be added, been touched by the notion of a margin of appreciation. The extension of the notion of a margin of appreciation beyond conditions of real emergency first occurred in the context of an application made under Article 4.<sup>1</sup> The entire Commission, in the *Belgian Linguistics* case, then made the following *obiter dictum*: 'A certain 'margin of appreciation' is also allowed to the contracting state under several articles which authorize restrictions on, or exceptions to the rights guaranteed'<sup>2</sup>—thus clearly favouring the view that the margin of appreciation applies to all 'accommodation' clauses. The State is thus allowed, even in non-crisis situations, two bites at the cherry, and it is obviously a matter of judgment whether this tips the delicate balance too much away from the individual. James Fawcett has suggested that the margin of appreciation occupies a middle position between what a democratic State considers necessary and what is objectively necessary to attain a permitted end.<sup>3</sup> The author of what is still the seminal article on the margin of appreciation has aptly characterized the views advanced by Fawcett as 'judicial self-restraint'.<sup>4</sup> In declining to make choices between alternative interpretations of permitted exceptions, the Commission undoubtedly tips the balance *somewhat* towards the State notwithstanding that it views itself as occupying 'middle ground'; though it may argue that its own control over the scope of the application of the margin of appreciation means that the movement has been only modest. One is also aware of the fact that, beyond the real difficulties that face the Commission in making judgments on certain issues (difficulties that are probably more real in the national security area than under normal '*ordre public*' clauses),<sup>5</sup> the Commission is exposed to the power of member States to renew or not to renew their recognition of the competence of the Commission under Article 25.

In some cases concerning qualifying clauses, the Commission has made reference to the margin of appreciation, though it is clear that its decision was justified by the very terms of the qualifying clause itself.<sup>6</sup> In yet others it has actually had some significance. Most often, its use has involved reliance upon the

*American Society of International Law*, 67 (1973), pp. 127-33; Higgins, 'The right under international law to enter, stay in and leave a country', *International Affairs*, July 1973, pp. 341-58; Higgins, 'Human Rights of Soviet Jews to leave: Violations and Obstacles', *Israel Yearbook on Human Rights*, 4 (1974), pp. 275-88. Jacobs makes the observation that the reference to *ordre public* in Article 2 (3) is shown by the *travaux préparatoires* to have been included expressly to cover the case of persons lawfully detained under Article 5: *op. cit.* (above, p. 288 n. 4), p. 184. There is authority for the view that a person detained with a view to deportation or extradition cannot claim the right to leave the country freely: *Collection of Decisions of the European Commission of Human Rights*, vol. 35, p. 169, A. 4436/70.

<sup>1</sup> *Iversen v. Norway*, *Yearbook*, 6 (1963), p. 278, A. 1468/62. For subsequent major reliance on this concept, see the *Belgian Linguistics* cases *Yearbook*, 6 (1963), pp. 332, 444; *Yearbook*, 7 (1964), pp. 140, 252, 280 (which touch on Article 14 read in conjunction with Article 2 of the First Protocol).

<sup>2</sup> Report of the Commission, A. 92. 711, pp. 374-5.

<sup>3</sup> See Fawcett, *op. cit.* (above, p. 306 n. 3), p. 248.

<sup>4</sup> Clovis Morrisson, 'Margin of Appreciation in Human Rights Law', *Human Rights Journal*, 6 (1973), p. 263 at p. 275.

<sup>5</sup> See above, p. 309.

<sup>6</sup> See, for example, *X. v. Denmark*, *Yearbook*, 5 (1962), p. 200. Article 8 (2), right of access by parent to children.



judgment of a domestic court which has allowed a restriction for reasons of public interest/morals, etc.<sup>1</sup> The Commission has used the margin of appreciation as a self-denying ordinance against its own review of all the evidence before that court. The Commission has also, in a decision much criticized for its lack of reasoning,<sup>2</sup> applied the margin of appreciation to the 'public interest' phrase in Article 1 of the First Protocol. If the introduction of margin of appreciation into 'accommodation' clauses is not to be open to criticism, the Commission's own fall-back role as ultimate scrutineer must look more impressive than it did in that case.

A recent reliance on the margin of appreciation under Article 10 (2) is to be found in the *Handyside* case. The so-called *Little Red Book* was a publication of a controversial nature aimed at schoolchildren. It had been published in Belgium, Finland, Germany, Greece, Iceland, Italy, Netherlands, Norway, Sweden, and Switzerland, and had circulated freely in Austria and Luxembourg. In the United Kingdom a summons had been served under the Obscene Publications Act of 1964. The applicant claimed that the United Kingdom was in breach of a variety of obligations under the European Convention. Of those, the Commission had found the claims relating to Articles 1, 9, 13 and 14 inadmissible; but had found admissible the claims in respect of Article 10 and Article 7 of Protocol 1. When the matter came before the Court it found that there had been interferences by the public authority contrary to Article 10; and proceeded to examine whether this could be justified by reference to Article 10 (2). Both the United Kingdom and a majority of the Commission had contended that the Court had only to ensure that the English courts acted reasonably and in good faith, and within the margin of appreciation left to States under Article 10 (2). A minority of the Commission thought, however, that while the Court's task was not to review the magistrate's judgment, it must none the less examine the book directly 'in the light of the Convention and nothing but the Convention'. The Court found that the adjective 'necessary' within the meaning of Article 10 (2) was less rigorous than 'strictly necessary' in Article 15; and that 'it is for the national authorities to make the initial assessment of the reality of the pressing social needs implied by the notion of "necessity" in this context'.<sup>3</sup> In a welcome assertion of authority in what had become an area of dangerous passivity the Court went on to point out that the margin of appreciation was none the less not unlimited: 'the domestic margin of appreciation thus goes hand in hand with a European supervision'.<sup>4</sup> It is important that the Court went on to say

<sup>1</sup> e.g. *X. and the German Association of Z. v. Germany*, *Yearbook*, 6 (1963), p. 204.

<sup>2</sup> See Morrisson, *op. cit.* (above, p. 313 n. 4), at pp. 280-1; also the excellent critical review of the case by Gilmour, 'The Sovereignty of Parliament and the European Commission of Human Rights', *Public Law*, 1968, pp. 62-73. His trenchant remarks about the hollowness of the Commission's reliance on passage of a Bill through Parliament as evidence of public interest are as apposite today as they were then.

<sup>3</sup> *Handyside* case, Judgment of 7 December 1976, para. 48.

<sup>4</sup> *Ibid.*, para. 49. This is very formalistic. Instead of mechanical reliance on isolated words in the text, it would have been preferable to keep sight of the criteria of reasonableness and proportionality. This writer has difficulty in seeing that it is reasonable for a State to derogate more easily from a right in a non-crisis rather than in a crisis situation.



that such supervision concerns both the aim of the measure as intended and its alleged necessity. The supervision would thus extend to the application of legislation even by independent courts. The Court's task included the 'review under Article 10 [of] the decisions they delivered in the exercise of their power of appreciation'.<sup>1</sup> In the event the Court proceeded to scrutinize in some detail, with reference both to all the data available to it and to its own decisions, the judgment of the Inner London Quarter Sessions. It reached the conclusion that there was no breach of the requirements of Article 10. The only real relevance of the margin of appreciation seemed to be that the Court refused to be heavily influenced by the fact that other member States had allowed the distribution of the *Little Red Book*, because the national margin of appreciation allowed different views to prevail about the protection of morals in a democratic society.<sup>2</sup> The Court seems to have sought to accommodate the anxiety of Governments by introducing reference to the margin of appreciation, while pointing to the need for international control and in fact not relying on it. This may have been politic; but the argument can also be advanced that *Handyside* has gratuitously kept alive a concept which has been increasingly difficult to control and objectionable as a viable legal concept. What evidence is needed, for example, to show that the margin of appreciation has *not* been exceeded? And is it the margin of appreciation of the legislature, or the courts, or even the Director of Public Prosecutions that we are concerned with? To what person or entity within the public life of a State is this notion to be extended?

#### IV. CONCLUSION

It was suggested at the outset that it was useful to regard 'clawback' and derogation clauses as techniques of accommodation, operating along a spectrum of possibilities. It must be emphasized that other devices, such as denunciation or reservation, although appearing at first sight simply to be further along the spectrum, are not conceptually comparable. This is because they cannot meet the tests that were earlier predicated. Denunciation of a treaty allows a State to opt out of its commitments, regardless of circumstance or the opinion of the international community as to the reasonableness of the action. Reservations provide for non-compliance with selected international standards even in non-crisis situations. This is not to say that States may not sometimes feel the need to make reservations to, or denounce, international instruments. Rather it is to point out that denunciation cannot play the same functional role as 'clawback' clauses or derogations in accommodating the interests of the individual and his community.

These views are fortified by the fact that the main human rights treaties contain denunciation clauses. So far as treaties of a more general nature are

<sup>1</sup> Ibid. In this bold statement the Court appears to be using 'margin of appreciation' to mean internal discretion rather than discretion *vis-à-vis* the organs of the Convention; or so it must appear in the case of a party where the Convention is not incorporated into domestic law.

<sup>2</sup> Ibid., para. 57.

concerned, denunciation frees a State only from the obligations in respect of those clauses that are not anyway binding as general principles of international law.<sup>1</sup> In the case of a convention such as the Genocide Convention, the right of denunciation operates not to relieve the denouncing State from the obligation nor to permit it to commit genocide, but to free it from certain procedural obligations.<sup>2</sup> The two United Nations Covenants stand almost alone in having no denunciation clause.<sup>3</sup> It is interesting that the Special Rapporteur on the Law of Treaties had endeavoured, when drafting Article 56 of the Convention on the Law of Treaties ('Denunciation of, or withdrawal from, a treaty containing no provision regarding termination, denunciation or withdrawal') to enumerate treaties under which there may be no denunciation. This proposal was defeated<sup>4</sup> largely on the grounds that it was undesirable in principle for the text to classify categories of treaties for any purpose.

Comparable considerations have arisen in relation to reservations to human rights conventions. In the case on *Reservations to the Genocide Convention*<sup>5</sup> the Court found that reservations were permissible if compatible with the object and purpose of the Convention. In reaching this conclusion the majority placed great emphasis on the desirability of a wide degree of participation in the convention,<sup>6</sup> while the joint dissenting opinion emphasized the enormity of the crime of genocide and the extensive interpretation that should be accorded to an instrument for its repression.<sup>7</sup> The European Convention on Human Rights allows for reservations. Article 64 provides:

(1) Any State may, when signing this Convention or depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention

<sup>1</sup> This self-evident principle is confirmed by Article 43 of the Vienna Convention on the Law of Treaties, *International Legal Materials*, 8 (1969), p. 679 at p. 696: 'The invalidity, termination or denunciation of a treaty, the withdrawal of a party from it, or the suspension of its operation, as a result of the application of the present Convention or of the provisions of the treaty, shall not in any way impair the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of the treaty'.

<sup>2</sup> This point is made by Waldock: *Yearbook of the I.L.C.*, 1963-I, p. 131.

<sup>3</sup> See Article 21 of the Convention on the Elimination of All Forms of Racial Discrimination; Article 14 of the Genocide Convention; Article 65 of the European Convention on Human Rights; Article 78 of the American Convention on Human Rights. The last two instruments do not permit denunciations for the first five years. The four Geneva Conventions of 1949 permit denunciations but expressly stipulate that denunciation does not impair the obligations of the parties under general international law.

The Optional Protocol of the Covenant on Civil and Political Rights has a denunciation clause: Article 12.

<sup>4</sup> See *Yearbook of the I.L.C.*, 1969-I, p. 69, 1969-II, p. 227; Report of the Committee of the Whole, *U.N. Conference on the Law of Treaties, Official Records*, A/Conf. 39/14, vol. 1, paras. 485-95. For a useful survey of the problem, see Weis, 'The Denunciation of Human Rights Treaties', *Human Rights Journal*, 1975, p. 3.

<sup>5</sup> *I.C.J. Reports*, 1975, p. 15.

<sup>6</sup> *Ibid.*, pp. 21-3.

<sup>7</sup> *Ibid.* For surveys of the *Reservations* case and subsequent measures adopted in the U.N. General Assembly, see Higgins, *The Development of International Law Through the Political Organs of the United Nations*, pp. 293-7; and for general studies on the question of treaties: Bishop, 'Reservations to Treaties', *Recueil des cours*, 103 (1961-II), p. 240; Holloway, *Les réserves dans les traités internationaux* (1958), pp. 133-252; Cox, 'Reservations in Multipartite Conventions', *Proceedings of the American Society of International Law*, 46 (1952), p. 26.



to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this Article.

(2) Any reservation made under this Article shall contain a brief statement of the law concerned.

The *travaux préparatoires* do not reveal that there was any great difficulty in accepting the appropriateness of a reservations clause.

Article 64 appears to limit reservations to the situation where the domestic law of a contracting State is not compatible with the obligations of the Convention *at the moment of ratification*, there being nevertheless an obligation to bring the domestic law into conformity remaining intact.<sup>1</sup> In other words the purpose of reservations under the European Convention is only to allow a contracting party a breathing space. Thus Norway, when ratifying the Convention, made a reservation under Article 9, because the Norwegian Constitution of 1814 contained a ban on Jesuits. The provision was later amended and the reservation withdrawn.<sup>2</sup> Again, Switzerland made a reservation which, when the denominational articles of the Federal Constitution were revised, was withdrawn.<sup>3</sup> However, it is also clear that States have not limited themselves to this type of reservation, but have also used reservations as a technique for interpreting their understanding of the scope of the obligations of the Convention.<sup>4</sup> France even made a reservation of this type under Article 15 of the Convention—itsself an ‘exceptions’ clause.<sup>5</sup>

The question of reservations received very detailed treatment in the drafting of the United Nations Covenants on Human Rights. On 5 February 1952 the General Assembly adopted Resolution 546 (VI), asking the Commission on Human Rights ‘to prepare for inclusion in the two draft international covenants on human rights, one or more clauses relating to the admissibility or non-admissibility of reservations and the effect to be attributed to them’.<sup>6</sup> The debate in the Commission focused on the admissibility of reservations to the draft Covenant on civil and political rights.<sup>7</sup> Opinion was divided as to whether

<sup>1</sup> In this sense, see Weil, *The European Convention on Human Rights*: ‘Although it was decided with regard to Article 57 that there need be no provision by which states expressly declare that the guarantee of the Convention be given full application in domestic law since this was taken for granted, the senior government officials considered it necessary to allow for reservations with regard to certain laws existing at the time of ratification which might be contrary to the Convention (Doc. CM/WP 4 (50) 19, p. 12)’ (pp. 172–3). Also Castberg, *The European Convention on Human Rights*, pp. 26–8.

<sup>2</sup> *Collected Texts* (9th edn.), p. 605.

<sup>3</sup> *Yearbook*, 12 (1969), p. 508. Presumably, it would be open to make a reservation of this type even to Article 3, i.e. to an article in respect of which no derogation is allowed.

<sup>4</sup> See, for example, the reservation made by France under Articles 5 and 6, *Collected Texts* (9th edn.), p. 603; by Germany under Article 7, *ibid.*, p. 604; by the United Kingdom under Article 2 of the First Protocol, *ibid.*, Section 6.

<sup>5</sup> See Jacobs, *The European Convention on Human Rights*, p. 209. The validity of the French reservation, on any normal ‘purposes’ test of interpretation, must surely be in doubt.

<sup>6</sup> For the rejection by the Commission of earlier proposals on reservations, see U.N. Doc. E/CN.4/677.

<sup>7</sup> Discussion of reservations in the draft Covenant on economic, social and cultural rights was limited to the question of reservations in the sense of limited territorial application clauses: see *ECOSOC Official Records*, 18th Session, Suppl. 7, paras. 294–7. This issue applied equally, of



reservations should be allowed at all; and if so whether they should be admitted without any limitation; whether they should be allowed only in respect of Part III of the Covenant, subject to the consent of two-thirds of the States parties; whether they should be admitted, in respect of Parts I and II, to the measures of implementation and the final clauses; and whether they should be limited to reservations 'compatible with the purpose and object of the Covenant'.<sup>1</sup> The United Kingdom proposed to the Commission a detailed draft article on reservations, the substantive part of which closely parallels the sense of Article 64 of the European Convention. The reservation would have been deemed accepted if not less than two-thirds of other States parties did not object to it within a specified period of time.<sup>2</sup> In an alternative proposal, China, Egypt, Lebanon and the Philippines suggested simply that reservations compatible with the purpose of the Covenant should be allowed; and that disputes relating to compatibility should be referred to the International Court by either the reserving party or by the party objecting to the reservation.<sup>3</sup> Chile and Uruguay represented in their draft proposal a third point of view—that no reservations should be allowed.<sup>4</sup> The Commission was unable to reach any agreement on any of these proposals, and after prolonged discussion of all the legal and political issues<sup>5</sup> finally asked ECOSOC to hand over all the pertinent documentation to the General Assembly.<sup>6</sup>

The Secretary-General drew the attention of the General Assembly to the legal problems inherent in the question of reservations.<sup>7</sup> The Assembly itself could make no progress on the issue. In 1966 the United Kingdom again attempted to insert a Reservations Clause into the draft Covenants;<sup>8</sup> and again, it was unsuccessful.<sup>9</sup> Thus at the Assembly's twenty-first session the Third Committee still had before it all the various proposals that had been advanced at the 18th Session of ECOSOC; and these were wholly unresolved by the time the Covenants were opened for signature.<sup>10</sup> It has rightly been noted that 'the absence of a provision [on reservations in the Covenants] does not mean that reservations to the Covenants are not admissible, but that the question is governed by the general rules of international law'.<sup>11</sup> The position would seem to be that reservations are to be allowed to the extent that they are compatible with the object and purpose of the Covenants; and that in the final analysis it is for each State party to decide whether the reservation in question meets that test. Either acceptance

course, to the draft Covenant on civil and political rights. See the Belgian proposals: U.N. Doc. E/CN.4/L.348.

<sup>1</sup> See *ECOSOC Official Records*, 18th Session, Suppl. 7, para. 264.

<sup>2</sup> U.N. Doc. E/CN.4/L.345 and Add. 1. And see the proviso in draft para. 7 that any State making a reservation should take 'as soon as practicable, such steps as will enable it to withdraw the reservation either in whole or in part'. Cf. the amendment by the U.S.S.R., which would have allowed reservations on the strictest terms: U.N. Doc. E/CN.4/L.349.

<sup>3</sup> U.N. Doc. E/CN.4/L.351.

<sup>4</sup> U.N. Doc. E/CN.3/L.354.

<sup>5</sup> See *ECOSOC Official Records*, 18th Session, Suppl. 7, paras. 274-304; E/2573.

<sup>6</sup> *Ibid.*, para. 305.

<sup>7</sup> U.N. Doc. A/5929.

<sup>8</sup> U.N. Doc. A/C.3/1353 rev. 3.

<sup>9</sup> U.N. Doc. A/C.3/1378; A/6.546, paras. 139-46.

<sup>10</sup> *G.A.O.R.*, 21st Session, Annexes, vol. 2, p. 86.

<sup>11</sup> Schwelb, 'The International Covenants on Human Rights' in Eide and Schou (ed.), *International Protection of Human Rights*, Nobel Symposium 7, p. 103 at p. 114.

or failure to object during the twelve-month period after notification of the reservation will constitute acceptance of the reservation *inter partes*.<sup>1</sup> Early practice indicates that reservations of different categories are likely to be made under both Covenants. The United Kingdom, in ratifying the Covenant on Economic, Social and Cultural Rights, has made certain reservations which have the effect of postponing the entry into effect of certain clauses in certain of its territories and dependencies.<sup>2</sup> But it has also gone beyond its own proposals of the early 1950s, and made reservations that are 'interpretative' to the extent that they indicate that there is no intention to change domestic law, but an assumption that there is no requirement for any change of the existing law; notwithstanding that on one possible reading of the text of the Covenant clause concerned, such a change could have been thought necessary.<sup>3</sup> This latter technique—that of making what are effectively reservations, by means of interpretative declarations—is used also by the United Kingdom in respect of several clauses under the Covenant on Civil and Political Rights.<sup>4</sup>

In conclusion, the delicate balancing of the rights of the individual with those of the State—which 'accommodation' and 'derogation' clauses represent in part—has so far been satisfactorily accomplished in human rights treaties. The institutions of the European Convention have (in respect of Article 15 at least) fulfilled with subtlety and vigour their task of contextual appraisal, making the fine distinctions between cases that are necessary to securing the reasonable balance. The firmness of grip has perhaps been less marked when the Commission has been dealing with accommodation clauses; but it would seem that the Court clearly perceives that the accommodation clauses require a comparable standard of scrutiny to that shown by the Commission in, for example, the *Greek* case. As for the United Nations Covenants, the anxiety naturally is not so much that proper caution might slip into unacceptable passivity, but rather whether the new Committee will be able to function with that same lack of bias between States parties that its European counterpart has shown. And that only time will tell.

## ADDENDUM

On 18 January 1978 the European Court of Human Rights delivered judgment in the case of *Ireland v. United Kingdom*.

Before the Court, the United Kingdom Government did not contest the Commission's opinion that the five techniques of interrogation which had been

<sup>1</sup> The Vienna Convention on the Law of Treaties provides, in this area, the clearest guide as to general international law on this matter. The guiding provisions, so far as the particular facts of the situation as it relates to the two U.N. Covenants are concerned, are Article 19 (c) and Article 20 (4) and (5). See *International Legal Materials*, 8 (1969), p. 679 at pp. 686–7.

<sup>2</sup> U.N. Doc. CN. 193, 1976, Treaties–6 (29 June 1976).

<sup>3</sup> *Ibid.*: see, for example, the reservation as to the right to interpret Article 6 of the Covenant on Economic, Social and Cultural Rights.

<sup>4</sup> And, notably, their acceptance of Article 12 (4) as subject to 'the right to continue to apply such immigration legislation governing entry into, stay in and departure from the United Kingdom as they deem necessary from time to time . . . '.

complained of amounted to inhuman treatment and torture under Article 3. Moreover, the United Kingdom Government gave an unqualified undertaking that these techniques would not in any circumstances be reintroduced. The Court none the less did not accede to the United Kingdom view that it would therefore serve no purpose to give a ruling on these points arising under Article 3. By sixteen votes to one, the Court held that the five techniques amounted to inhuman and degrading treatment, but by thirteen votes to four the Court found that the use of these techniques did not amount to torture. The Court has therefore taken the opportunity to establish that certain interrogation techniques are unacceptable, and cannot be made acceptable by reliance on Article 15; there is no derogation permitted in respect of inhuman and degrading treatment. At the same time it has—rightly in the views of this writer—reserved the attribution of torture to practices which ‘occasion suffering of the particular intensity and cruelty implied by the word’.

After referring to the margin of appreciation, the Court rejected the Irish contention that the special powers of arrest, detention and/or internment exercised by the United Kingdom Government exceeded, as derogations from the Convention, what was strictly required by the exigencies of the situation.



NOTE

THE EVOLUTION OF THE CONCEPT OF  
SOVEREIGNTY OVER THE BED AND SUBSOIL OF  
THE TERRITORIAL SEA\*

By GEOFFREY MARSTON<sup>1</sup>

I. INTRODUCTION

It is proposed in this note to discuss the historical evolution of the coastal State's sovereignty over the bed and subsoil of its territorial sea. Although the existence of this sovereignty is no longer in dispute, many current issues of maritime jurisdiction, particularly in municipal courts, depend for their solution on a correct historical appreciation of past events and doctrines.

Numerous writers have described and analysed the historical development of the concept of territorial sea, but overwhelmingly these writers have concentrated on the uses and resources of the water column, particularly for navigation and fishing. Since 1945, there has also been a substantial volume of literature dealing with the evolution of the continental shelf doctrine. Hardly anyone, however, has separately and specifically traced the development of the rules of international law concerning the bed and subsoil of the territorial sea. This gap is perhaps due in part to an impression, to be discussed later, that the concept of what is now called compendiously 'territorial sea' is and has always been unitary, and that the water column, the seabed and the subsoil could not be meaningfully distinguished in a historical analysis.

The lack of published research on this matter has not prevented the expression of views on when the concept of sovereignty over the territorial sea, including its bed and subsoil, emerged as a settled rule of customary law. In recent years such views have been uttered frequently in the context of constitutional disputes between federal governments and the governments of federated states and provinces. Thus in *United States v. California* in 1947 the United States Supreme Court stated:

But when this nation was formed, the idea of a three-mile belt over which a littoral nation could exercise rights of ownership was but a nebulous suggestion.<sup>2</sup>

Three years later, the Supreme Court considered the status of the marginal sea and subjacent land adjacent to the shores of Texas in 1845. It declared:

We assume that as a Republic she had not only full sovereignty over the marginal sea but ownership of it, of the land underlying it, and of all the riches which it held. In other words we assume that it then had the *dominium* and *imperium* in and over this belt which the United States now claims.<sup>3</sup>

\* © Dr. Geoffrey Marston, 1977.

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<sup>2</sup> 332 U.S. 19, 32 (1947).

<sup>3</sup> *United States v. Texas*, 339 U.S. 707, 717 (1950). See also the impressive 'Joint Memorandum' by many eminent jurists, printed in Whiteman, *Digest of International Law*, vol. 4, pp. 780-1.

In Australia, too, views have recently been expressed on the matter. When introducing a Territorial Sea and Continental Shelf Bill, the Commonwealth Minister for National Development stated in the House of Representatives on 16 April 1970:

For present purposes, however, it is clear that, at least since the end of the 18th century (in effect, that is to say, throughout the whole history of British settlement in Australia) international law has recognised a belt of the open seas adjacent to the coasts of Her Majesty's dominions as being within the sovereignty of Her Majesty.<sup>1</sup>

As British settlement in Australia began about 1788, this view lies uneasily with that of the United States Supreme Court in the California case, where the critical date was 1776. It would be unusual if a clear customary rule could have developed in a period of only a dozen years at the end of the eighteenth century.

A more cautious opinion on the precise subject of this paper was given in 1968 by Mr. C. W. Harders, then Deputy-Secretary of the Attorney-General's Department of the Commonwealth of Australia. Giving evidence to a Senate Select Committee on Off-Shore Petroleum Resources, Mr. Harders stated:

The time factor alone provides reason for caution in considering the applicability of the United States decisions to the Australian situation. I am disposed to think that on a thorough legal-historical analysis, which space does not permit here, it will be found that at the date of the Commonwealth of Australia Constitution Act (9 July 1900) international law recognized that the sovereignty of a coastal State extended not only to the territorial sea, but also to its bed and subsoil.<sup>2</sup>

In the recent case on the validity of the Seas and Submerged Lands Act 1973, passed by the Commonwealth Parliament, some members of the High Court of Australia implied that such a time-scale was correct, though they did not find it necessary to resolve the point.<sup>3</sup>

## II. HISTORICAL DEVELOPMENT UP TO 1900

Early inter-State practice was not concerned with the marginal seabed and subsoil so much as with activities on and in the superjacent waters. This was not because there was a lack of municipal practice. Submarine coal mines in the British Isles date from the early seventeenth century.<sup>4</sup> The French jurist Gilbert Gidel, in an illuminating footnote, stated that undersea mines had been constructed not only in Britain but in France, Spain, Chile, Australia, Canada, Japan and Sumatra.<sup>5</sup> Furthermore, for centuries piers and similar structures have been constructed on the bed of the sea by most coastal States. The reason for the lack of inter-State practice at this time was that international disputes did not arise over the construction of submarine mines to a relatively short distance from the shore. Nor was the construction of piers so extensive as to impede foreign navigation and thus draw diplomatic protests from other States. There was as a result little State practice of the kind from which rules of customary international law develop. It is true, nevertheless, that the British Crown had claimed from at least the early seventeenth century to be the proprietor of submerged lands to

<sup>1</sup> *House of Representatives Debates*, vol. 66, p. 1277 (Commonwealth of Australia).

<sup>2</sup> *Report from the Senate Select Committee on Off-Shore Petroleum Resources*, p. 133 (Commonwealth of Australia Parliamentary Paper No. 201 of 1971).

<sup>3</sup> *New South Wales and Others v. Commonwealth of Australia*, (1975) 8 A.L.R. 1, 12 (Barwick C. J.), 89 (Mason J.).

<sup>4</sup> See Galloway, *Annals of Coal Mining and the Coal Trade*, vol. 1 (1898), p. 127.

<sup>5</sup> Gidel, *Le droit international public de la mer*, vol. 1 (1934), p. 510 (footnote).

an unspecified distance from the shores of its territories. This claim, though never tested in the courts, was backed by extensive and consistent executive practice, and on occasions by the legislature.<sup>1</sup> It was, however, a claim in municipal law, owing nothing in its origin and nature to international law.

In 1875 occurred one of the rare occasions when the status of the marginal subsoil was discussed as an international question before the present century. During negotiations for a tunnel to link England and France the British members of a Joint Commission reported to the Treasury as follows:

It is presumed that, by the law of France, the right of property in all unappropriated soil is vested in the State, as it is in this country in the Crown, and that such right includes the soil of the bed of the sea, to the distance seaward to which the country extends. . . .<sup>2</sup>

The French members were less certain of the law. They remarked:

. . . au delà du territoire propre à chaque nation et défini par la ligne du niveau des plus basses eaux, il existe un espace à l'égard duquel des droits de propriété peuvent sembler incertains.<sup>3</sup>

Turning to the writings of publicists, Price Daniel, Attorney-General of Texas, set out in tabular form extracts from the works of numerous writers in a paper he prepared for the 44th Conference of the International Law Association in 1950. He drew the following conclusion:

. . . since 1670 international law has conceded both sovereignty and ownership of the marginal sea, its bed and subsoil to the littoral state and the ownership of the bed and subsoil is distinct and severable, although always subject to governmental powers designed to protect the public use and navigation of the overlying waters.<sup>4</sup>

Perusal of the extracts set out by Price Daniel reveals, however, that apart from those authors who confined their attention to the municipal law claim of the British Crown, e.g. Hale in England and Angell in the United States, only three writers cited before 1900 specifically mentioned that the bed and subsoil of the marginal sea, as distinct from the superjacent waters, were *ipso facto* under the 'sovereignty' or 'ownership' of the coastal State. The three were J. M. Rayneval of France in 1803, Reinhold Nizze of Germany in 1857 and Oliveira Freitas of Brazil in 1884.

Similarly, in the extensive quotations from jurists set out in the judgment of Sir Alexander Cockburn in the *Franconia* case in 1876<sup>5</sup>—e.g. Grotius, Merlin, Bynkershoek, Bluntschli, Kaltenborn, Heffter, Ortolan, Casaregis, Massé, Pando, Loccenius, Moser, Lampredi, Galiani, Martens, Schmalz, Klüber, Wheaton, Calvo, Pasquale Fiore, Halleck, Manning—there was no specific mention of the submerged land as distinct from the superjacent waters. T. W. Fulton, one of the most influential writers on the maritime practice of Britain, gave only one reference in 500 pages to the submerged soil and that was in the context of the Crown's municipal law claim.<sup>6</sup> The valuable compilation of State practice and publicists' views made by Henry Crocker similarly produces no evidence that jurists paid specific attention to the status of the marginal bed and subsoil during this period.<sup>7</sup> Nor does Professor D. P. O'Connell,

<sup>1</sup> e.g. Cornwall Submarine Mines Act 1858, s. 2; Crown Lands Act 1866, s. 7.

<sup>2</sup> C. 3358, p. 87.

<sup>3</sup> *Ibid.*, p. 133.

<sup>4</sup> Daniel, 'Sovereignty and Ownership in the Marginal Sea and their Relationship to Problems of the Continental Shelf', *Baylor Law Review*, 3 (1951), pp. 250-1.

<sup>5</sup> *R. v. Keyn*, (1876) L.R. 2 Ex. D. 63, 159-238.

<sup>6</sup> Fulton, *The Sovereignty of the Sea* (1911), p. 362.

<sup>7</sup> Crocker, *The Extent of the Marginal Sea* (1919).



in a learned article on the juridical nature of the territorial sea, treat the subjacent land as a separate concept.<sup>1</sup>

It could be argued, however, that the theory which regarded the marginal sea as being under *dominium* as well as *imperium* put the subjacent soil under the same legal regime as the water column by necessary implication. There was thus no need, it may be said, to mention the bed and subsoil specifically. Nineteenth-century writers were not lacking to support the view that the marginal sea was regarded as part of the territory of the coastal State, as the compilations by Daniel and Crocker show. But the question was hotly contested by other theorists who argued that the marginal sea was subject only to a limited police jurisdiction and not to sovereignty.

In Britain, the debate came to a head in the *Franconia* case and the subsequent Parliamentary debates on Bills designed to remedy the situation in English law revealed by that decision. Although the Government paid lip service to the spirit of a private members' Bill which constituted the 'high seas' to three miles as 'part of the dominions of Her Majesty',<sup>2</sup> its own replacement Bill, which became the Territorial Waters Jurisdiction Act 1878, was significantly different in that it made no direct attempt to annex the marginal belt. Instead it introduced the concepts of 'rightful jurisdiction' and 'territorial sovereignty', not by way of the enacting sections but in the preamble and definition section respectively.

The police jurisdiction theory was stressed in particular by German writers and could have influenced the German Government's legal advisers, who in a memorandum passed to the British Government in 1879 stated:

Our Government is of opinion that at present there is no concord amongst the maritime States either as to the extent of the space subject to the territorial supremacy of a State in its coast waters, or as to the nature and purport of that supremacy.<sup>3</sup>

The period from 1876 to 1900 saw a flowering of research in respect of the legal status of the marginal belt. O'Connell has made a head-count showing the quantity and diversity of the views expressed.<sup>4</sup> But few of the publicists specifically considered the status of the bed and subsoil of the marginal belt. British thinking, in particular, had not abandoned the possibility that in international law these areas were not *ipso facto* and *ipso jure* under the sovereignty of the coastal State. The alternatives were that the areas either remained *res nullius* until they were specifically occupied in some manner, or that they were under the constructive occupation of the coastal State though capable of being acquired by another State if the latter actually occupied them. Thus in the *Franconia* case, Cockburn C. J. declared:

Beyond low-water mark the bed of the sea might, I should have thought, be said to be unappropriated, and, if capable of being appropriated, would become the property of the first occupier.<sup>5</sup>

At the time of the Channel tunnel controversy in 1882, the editorial writer of the *Law Journal* considered the possibility of a tunnel being driven from France towards the English coast. He stated:

From the limit of British jurisdiction to the foreshore at Dover, excavators would come

<sup>1</sup> O'Connell, 'The Juridical Nature of the Territorial Sea', this *Year Book*, 45 (1971), p. 304.

<sup>2</sup> *Hansard's Parliamentary Debates*, 3rd series, vol. 233, cols. 1398-1403 (Attorney-General).

<sup>3</sup> Cited in H. A. Smith, *Great Britain and the Law of Nations* (1935), vol. 2, p. 202. See generally O'Connell, 'German Literature on the Territorial Sea—18th and 19th Centuries', *Multitudo Legum Ius Unum: Essays in Honour of Wilhelm Wengler* (1973), p. 325.

<sup>4</sup> This *Year Book*, 45 (1971), at p. 335.

<sup>5</sup> (1876) L.R. 2 Ex. D. 63, 116.

within the influence of the rule that the sea within the limit is presumed to be in the possession of the country whose coast adjoins. But the Territorial Waters [Jurisdiction] Act, 1878, applies only to jurisdiction on the sea, not to the land under the sea; and the rule as to the jurisdiction of the adjacent country cannot apply to land under the sea acquired by a foreigner from seawards. The three-miles' rule assumes possession, being calculated according to the carrying powers of a cannon; and, if there is any constructive possession of the land under the three miles of sea, it must give way to actual possession by a tunnel.<sup>1</sup>

Finally, in the *Behring Sea* Arbitration in 1893, the leading British counsel, Sir Charles Russell, Q.C., was stated by a colleague in the British team to have adopted in its entirety the view of Cockburn C. J. to the effect that 'without evidence of a claim made such territorial waters do not exist'.<sup>2</sup>

In conclusion, it is submitted that although the supporters of full sovereignty over the marginal sea never lost their influence during the progress of the nineteenth century, the fact that there was such a hotly-fought doctrinal dispute together with ambivalent State practice prevented the formation of a general customary rule to this effect before 1900. Even less likely was the crystallization of a rule of *ipso facto* attribution in respect of the subjacent land.

### III. FROM 1900 TO THE HAGUE CODIFICATION CONFERENCE, 1930

Professor O'Connell sees the turn of the century as a watershed. He writes:

After 1900 the controversy about the juridical nature of the territorial sea waned, and scarcely any author took issue with the notion that the territorial sea is subject to sovereignty.<sup>3</sup>

As the author goes on to mention several post-1900 publicists who continued the fight for limited police jurisdiction, such a conclusion seems too sweeping. Furthermore, those who espoused the concept of sovereignty for the territorial sea (or 'territorial waters' as it was then usually called) rarely made specific mention of the subjacent land as partaking of the same sovereignty.<sup>4</sup> The emphasis was still on the water area. Paradoxically, the event which can now be seen as having had an effect on the evolution of the concept under discussion was the coming of air travel. This led to discussion of the legal status of airspace above a State's land territory and its marginal sea. On 13 October 1919 the Paris Convention Relative to Air Navigation was signed by thirty-two States. Article I, under the heading 'General Principles', stated:

The High Contracting Parties recognize that every Power has complete and exclusive sovereignty over the air space above its territory.

For the purpose of the present Convention the territory of a State shall be understood as including the national territory, both that of the mother-country and of the colonies, and the territorial waters adjacent thereto.<sup>5</sup>

Thus, not only were the 'territorial waters' deemed to be part of national territory but it was now possible to envisage the marginal sea as part of a column of sovereignty

<sup>1</sup> *The Law Journal*, 17 (1882), p. 83.

<sup>2</sup> Article by 'A Legal Correspondent', *The Morning Post*, 21 May 1923.

<sup>3</sup> *This Year Book*, 45 (1971), at p. 343.

<sup>4</sup> A notable exception was Lassa Oppenheim, whose first edition appeared in 1905.

<sup>5</sup> *British and Foreign State Papers*, vol. 112, p. 931. See also Martial, 'State Control of the Air Space over the Territorial Sea and the Contiguous Zone', *Canadian Bar Review*, 30 (1952), p. 245.

extending upwards into the airspace. It was easy thereafter to extend this column downwards to include the subjacent land.

(a) *British practice*

The reluctance of Britain to commit itself to one view or the other in its international practice continued into the 1920s. The Foreign Office legal adviser, Sir Cecil Hurst, wrote two influential articles for the newly founded *British Year Book of International Law*. In the first—‘The Territoriality of Bays’—he dealt with the problem of the delimitation of internal waters.<sup>1</sup> He considered that *R. v. Keyn* showed clearly that the territorial waters were not part of the national territory.<sup>2</sup> The second article—‘Whose is the Bed of the Sea? Sedentary Fisheries outside the Three-Mile Limit’—is more relevant to the present discussion.<sup>3</sup> In it, Hurst analysed the status of the submerged land situated both beyond and within three miles from the coast. His analysis touched on both international law and municipal law authorities, and frequently it is difficult to determine which line of authorities he was following in any one passage. Hurst considered that in municipal law the property in the bed of the sea, at least to three miles, was vested in the Crown. He relied for this proposition on the Cornwall Submarine Mines Act 1858.<sup>4</sup> His conclusion read:

... so far as Great Britain at any rate is concerned, the ownership of the bed of the sea within the three-mile limit is the survival of more extensive claims to the ownership of and sovereignty over the bed of the sea. The claims have become restricted by the silent abandonment of the more extended claims. Consequently, where effective occupation has been long maintained of portions of the bed of the sea outside the three-mile limit, those claims are valid and subsisting claims, entitled to recognition by other States.<sup>5</sup>

Hurst did not expound the view of *Keyn* set out in his first article nor did he give any separate reason for assuming, as he must have assumed, that the Crown’s claim to the submerged land within three miles of the shore was equally entitled to recognition by other States, whether it had been ‘effectively occupied’ or not.

In December 1924, Sir Thomas Barclay, who was rapporteur of the Territorial Sea Committee of the Institut de Droit International, wrote to the Ministry of Agriculture and Fisheries, asking whether there had been any general order respecting the utilization of the floor of territorial waters. He asserted that modern development required recognition of the right of the adjacent State to the ‘absolute dominion’ over the three-mile belt, both under the sea and, subject to the right of innocent passage for foreign ships, above it. The question was referred to the Foreign Office where the Second Legal Adviser, W. Malkin, replied:

The question put can, so far as I am aware, be answered simply in the negative, but there is no reason why a reference should not be given to Sir C. Hurst’s article, provided that it is not suggested that it is official.<sup>6</sup>

(b) *League of Nations practice*

As the result of a resolution of the Assembly of the League of Nations dated 22 September 1924, a Committee of Experts for the Progressive Codification of Inter-

<sup>1</sup> This *Year Book*, 3 (1922–3), p. 42.

<sup>2</sup> Ibid., p. 45. He did not think the Territorial Waters Jurisdiction Act 1878 had so incorporated them.

<sup>3</sup> This *Year Book*, 4 (1923–4), p. 34.

<sup>4</sup> This Act was passed following an arbitration between the Crown and the Duchy of Cornwall.

<sup>5</sup> This *Year Book*, 4 (1923–4), at p. 43.

<sup>6</sup> Public Record Office reference F.O. 372/2110, folio 166.



national Law was established. Amongst the topics which the Committee proposed to study was the law of the territorial sea. A sub-committee was appointed for the purpose, consisting of W. Schücking of Germany, Barbosa de Magalhaes of Portugal and G. Wickersham of the United States. On 9 January 1926, the sub-committee presented its report, which took the form of a memorandum by Schücking followed by comments by the other two members, together with a proposed draft convention drawn up by Schücking and amended by him in the light of the comments.

In his memorandum, Schücking put the bed and subsoil of the territorial sea into the same juridical category as its waters. He wrote:

In virtue of its right of dominion over the whole area of its territorial waters, the riparian State possesses for itself and for its nationals the sole right of ownership over the riches of the sea. This right covers the fauna found in the waters, and also everything which may be found above or below the subsoil of the territorial sea (coral-reefs, oil-wells, tin-mines).<sup>1</sup>

The first article of the draft convention submitted by the sub-committee ran as follows:<sup>2</sup>

*The character and extent of the rights of the riparian State.* The State possesses sovereign rights over the zone which washes its coast, in so far as, under general international law, the rights of common user of the international community or the special rights of any State do not interfere with such sovereign rights.

Such sovereign rights shall include rights over the air above the said sea and the soil and sub-soil beneath it.

Article 11 of the draft read in part:

*Riches of the sea, the bottom and the subsoil.* In virtue of its sovereign rights over the territorial sea, the riparian State shall exercise for itself and for its nationals the sole right of taking possession of the riches of the sea, the bottom and the subsoil.

The report was then submitted to the Member States of the League for comment. Only three States of the thirty which replied specifically mentioned the above provisions, which were approved in principle.

By a League Resolution dated 28 September 1927, a Preparatory Committee for a future International Law Codification Conference was set up. In 1929 this Committee asked Member States to furnish information, *inter alia*, on 'the application of the rights of the coastal State to the air above and the sea bottom and subsoil covered by its territorial waters'. Most States replied that in their view 'sovereignty' or 'sovereign rights' applied to the bed and subsoil.<sup>3</sup> The Netherlands reply quoted as supporting evidence a concession for the mining of tin under part of the territorial sea of the Dutch East Indies. Sweden cited a Royal decree of 1897 prohibiting the removal of stones from the sea bottom along part of the Swedish coast. The United States' reply was the only one to use the term 'property':

The sea-bottom and subsoil covered by the territorial waters, including fish and minerals, are the property of the United States or of the individual States where they border.

Only the Polish reply struck a discordant note. It ran:

While the question of the subsoil and the air over the territory of States may be regarded

<sup>1</sup> League of Nations Document C. 196. M. 70. 1927. V., p. 53.

<sup>2</sup> *Ibid.*, pp. 72-3.

<sup>3</sup> The replies are collected in League of Nations Document C. 74. M. 39. 1929. V., pp. 18-21.

as more or less settled, that of the air above and the sea bottom and subsoil covered by territorial waters is still undecided.

The Preparatory Committee, observing optimistically that 'unanimity exists on this point', then drew up Basis of Discussion No. 2, which ran:

The sovereignty of the coastal State extends to the air above its territorial waters, to the bed of the sea covered by those waters and to the subsoil.

This text went forward to the Codification Conference which opened, with forty-eight States represented, at The Hague on 17 March 1930. At the fifth meeting of the Second Committee, held on 21 March, the United States' delegate, D. H. Miller, put forward a revised formula which read:

The territory of the coastal State includes the air above the territorial waters, the bed of the sea covered by those waters, and the subsoil.<sup>1</sup>

Miller took the view that the air, water and subsoil formed an undivided part of the territory of the State. The Norwegian delegate, the jurist Raestad, took issue both with the Basis of Discussion text and the Miller amendment. He declared:

What is, from a legal standpoint, the source from which States derive their rights over the subsoil beneath their territorial waters? The answer is that these rights are derived from their possession of the land territory. Accordingly, in my view, we ought to say that 'the land territory includes the subsoil covered by the inland and external waters of the coastal State up to the limit of such waters.'

It is rather putting the cart before the horse to say that the rights of the State over the subsoil are derived in any way from its rights over the territorial sea. It would seem, indeed, more correct to say that it is the breadth of the territorial sea which determines the distance, measured from some point on land, up to which the State may utilise the subsoil.<sup>2</sup>

The British delegate, Sir Maurice Gwyer, Treasury Solicitor, 'fully accepted' the principle in the United States' amendment. He commented:

The principle is that the belt of territorial water surrounding a State is to be regarded as an extension of its land territory, and, inasmuch as the sovereignty of a State over its land territory extends to the subsoil beneath and to the air above, that same principle must apply in the case of that portion of its territory which is covered by its territorial waters.<sup>3</sup>

Badaoui Pasha, the Egyptian delegate, rejected the 'extension of land' theory as applied to the submerged soil. He remarked:

Any enterprise for the exploitation of the subsoil has a clear connection with the utilisation of the territorial waters. The subsoil cannot be utilised without crossing or utilising the territorial waters. It cannot be argued that the subsoil beneath the territorial waters, because it is land, is really connected with the idea of territory.<sup>4</sup>

Miller, in summing up, declared:

I take it that no one here disputes the fact that the territory of the coastal State includes the air above the territorial waters, nor the fact that the territory of the coastal State includes the bed of the sea, nor the fact that the territory of the coastal State includes the subsoil.<sup>5</sup>

<sup>1</sup> League of Nations Document C. 351 (b), M. 145 (b). 1930. V., p. 48.

<sup>2</sup> Ibid., p. 49.

<sup>3</sup> Ibid., p. 50.

<sup>4</sup> Ibid., p. 51.

<sup>5</sup> Ibid., p. 55.

The United States' amendment was then carried by twenty-four votes to seven. The final draft, as annexed to the Second Committee report as Article 2, ran as follows:

The territory of a coastal State includes also the air space above the territorial sea, as well as the bed of the sea, and the subsoil.

Nothing in the present Convention prejudices any Conventions or other rules of international law relating to the exercise of sovereignty in these domains.<sup>1</sup>

In its observations on the text, the Second Committee remarked:

The text as drafted is on similar lines to the previous article. It therefore follows that the coastal State may also exercise sovereignty in the air space above the territorial sea, and over the bed of the sea and the subsoil. It is important to emphasise that in these domains also sovereignty is limited by the rules of international law. As regards the territorial sea, including the air and the bed of the sea as used in maritime navigation, these limitations are, in the first place, to be found in the present Convention. So far as concerns the air space the matter is governed by the provisions of other Conventions; as regards the bed of the sea and the subsoil, there are but few rules of international law.<sup>1</sup>

The 'previous article' referred to in the above observations was draft Article 1, which declared:

The territory of a State includes a belt of sea described in this Convention as the territorial sea. Sovereignty over this belt is exercised subject to the conditions prescribed by the present Convention and the other rules of international law.<sup>2</sup>

Although this text was adopted by the Second Committee without a vote, there had been considerable discussion on the doctrinal implications of the concept of sovereignty as applied to the territorial sea. Differences among the States over such matters as the breadth of the territorial sea prevented a text having treaty force emerging from the Conference. To those responsible for forming international law, however, the bed and subsoil of the territorial sea were henceforth assumed to be an integral part of that sea. That this had not been clearly perceived before the Conference was remarked upon by Gidel in 1934. He wrote of the draft Article 2:

C'est, semble-t-il, la première fois qu'une disposition a jamais été formulée expressément dans un document international collectif d'ordre positif concernant le sol et le sous-sol de l'espace maritime en général et de la mer territoriale en particulier.<sup>3</sup>

#### IV. FROM THE HAGUE CODIFICATION CONFERENCE TO THE PRESENT DAY

The Conference, though it failed to produce a treaty text, was regarded by many as having elucidated a rule of customary international law on the issue under discussion in this paper. Thus on 28 July 1936 the British Foreign Office instructed the British Embassy in Venezuela to open negotiations with the Venezuelan Government for an agreement to delimit the bed and subsoil of the Gulf of Paría. In its instructions, the Foreign Office wrote:

. . . in international law the bed of the sea beneath territorial waters and the subsoil beneath that bed are already considered as being in the possession of the territorial State. The bed of the sea and accompanying subsoil beneath the high seas on the other hand is

<sup>1</sup> Ibid., p. 213.

<sup>2</sup> Ibid., p. 212.

<sup>3</sup> Gidel, *Le droit international public de la mer*, vol. 3 (1934), p. 326.



*res nullius*, but is capable of acquisition by effective occupation in the same manner as any unoccupied territory above the level of the sea.<sup>1</sup>

The draft Articles of the 1930 Conference formed the starting-point for the International Law Commission in its work of codifying the law of the sea in the early 1950s. The Commission's Special Rapporteur was J. P. A. François of the Netherlands, who had been Rapporteur to the Second Committee in 1930. François declared in his first report to the Commission of 4 April 1952:

It follows from the sovereignty over the territorial sea, stated in Article 2 [of the 1930 draft] that the territory of the coastal State includes, apart from express exclusion, the soil covered by the territorial sea, as well as the subsoil. Although there are some contrary views among writers, the practice of a certain number of States accepts this sovereignty. Moreover the International Law Commission in its draft articles on the continental shelf adopted in 1951 . . . has already taken this view.<sup>2</sup>

The Commission's discussions on the subject of the territorial sea between 1952 and 1956 did not turn specifically to the bed and subsoil, although there was again discussion about the concept of sovereignty as applied to the belt in general. At its 8th session in 1956, the Commission unanimously adopted the following draft Article 2:

The sovereignty of a coastal State extends also to the airspace over the territorial sea as well as to its bed and subsoil.

The Commission observed of this text: 'This article is taken, except for purely stylistic changes, from the regulations proposed by the 1930 Codification Conference.'<sup>3</sup>

On 24 February 1958 the First United Nations Law of the Sea Conference opened at Geneva with eighty-six States represented. Article 2 of the draft was adopted without objection at the 59th Meeting of the First Committee and by seventy-five votes to none at the 19th Plenary Meeting of the Conference. Although the old controversy about the content of the concept of sovereignty was ventilated by a few delegates there was no discussion of the substance of the draft article.

The draft was then incorporated as Article 2 of the Convention on the Territorial Sea and the Contiguous Zone, which entered into force on 10 September 1964 for those States which had deposited instruments of ratification or accession.<sup>4</sup>

## V. THE THEORETICAL BASES OF SOVEREIGNTY

The relative shortage of State practice and the casual and subsidiary way in which the marginal bed and subsoil were brought under coastal State sovereignty produced a number of conflicting theories, most of them *ex post facto*, as to why such sovereignty should exist. The following theories can be identified:

(a) *That the principle embodied in the Roman Law maxim usque ad caelum et ad inferos applied.* According to this theory, once the superjacent waters and airspace had been brought under State sovereignty, the bed and subsoil automatically had the same status. Lassa Oppenheim relied on this notion to claim that the land under the territorial sea was part of State territory in international law.<sup>5</sup> It was also the view of the British Government at the 1930 Codification Conference, as evidenced by the extract from the

<sup>1</sup> Public Record Office reference F.O. 371/19847, folio 429.

<sup>2</sup> *Yearbook of the I.L.C.*, 1952, vol. 2, p. 28 (original in French).

<sup>3</sup> *Ibid.*, 1956, vol. 2, p. 265.

<sup>4</sup> *United Nations Treaty Series*, vol. 516, p. 205.

<sup>5</sup> Oppenheim, *International Law*, 1st edn. (1905), pp. 223, 239-40.

speech of Sir Maurice Gwyer set out earlier. Sir Humphrey Waldock seems to have followed this reasoning when in 1950 he wrote:

It is, perhaps, also worth noticing that even the seabed and subsoil of the maritime belt came to be accepted as within the sovereignty of the coastal State, not because of its geological connection with the dry land but because it was regarded as part of the territorial waters.<sup>1</sup>

(b) *That the soil of the marginal sea was 'an extension of the land mass'.* This theory conflicts with (a) above in that it makes the subjacent soil rather than the waters the primary subject-matter of sovereignty. Raestad espoused this view at the 1930 Conference as shown in the debates set out earlier. In a wider sense, it contains the seeds of the modern doctrine of 'appurtenance' of the continental shelf. Thus the International Court of Justice in the *North Sea Continental Shelf Cases* remarked:

What confers the *ipso jure* title which international law attributes to the coastal State in respect of its continental shelf, is the fact that the submarine areas concerned may be deemed to be actually part of the territory over which the coastal State already has dominion,—in the sense that, although covered with water, they are a prolongation or continuation of that territory, an extension of it under the sea.<sup>2</sup>

(c) *That the bed and subsoil of the marginal sea were under the occupation of the coastal State.* This theory is clearly a fiction as regards the subsoil, and only a little less so as regards the seabed. Its intellectual ancestry may be traced back to the early notions that the waters of the marginal belt were under constructive occupation because they were subject to the control of coastal guns (or would be if sufficient guns were mounted). Yet as a theory it has had as much and possibly more influence on the development of the rule now in Article 2 than the others. Thus Sir Cecil Hurst based his idea of sovereignty over the seabed beyond three miles on the occupation of a *res nullius*, and the guess may be hazarded that if asked why he assumed that the first three miles of seabed were already under coastal State sovereignty he would have replied in terms of constructive occupation.

(d) *That the bed and subsoil of the marginal sea were res nullius but that the coastal State alone had the right to occupy them.* The French jurist Fauchille is associated with this theory. Writing in 1925 he rejected the right of any other State to occupy the bed and subsoil of the marginal sea. He considered that the coastal State alone had the right to carry out such an occupation, not because it was the proprietor under an existing title but because the protection and security of its own territory demanded that other States be excluded.<sup>3</sup> It is worth noting here that a version of this theory was ventilated by legal advisers within the British Government Departments at the time of the Truman Proclamations in 1945 concerning the continental shelf. At first, it was thought that other States could be 'bought off' only by treaty, as had occurred over the Gulf of Paría in 1942; later, the British Government came round to accept a right of *ipso jure* appurtenance of the shelf to the coastal State.<sup>4</sup>

<sup>1</sup> Waldock, 'The Legal Status of Claims to the Continental Shelf', *Transactions of the Grotius Society*, 36 (1950), at p. 120. It is worth noting here that one of the dissenting judges in *R. v. Keyn*, Grove J., remarked: '... the ship is availing itself of the soil, which, to give the country a right of interference, must be assumed to be a part of the territory of that country; if so, the water over that soil must, it seems to me, also belong to that territory; *cujus est solum ejus est usque ad coelum* is a maxim of general application ...' (1876) L.R. 2 Ex. D. 63, 116.

<sup>2</sup> *I.C.J. Reports*, 1969, at p. 31.

<sup>3</sup> Fauchille, *Traité de droit international public*, vol. 1, part 2 (1925), p. 204.

<sup>4</sup> See, e.g., draft memorandum to Cabinet of 31 October 1946 (Public Record Office reference F.O. 371/51708).

## VI. CONCLUSION

That States have sovereignty over the bed and subsoil of their territorial seas is now an uncontroverted rule of customary international law, quite apart from the provisions of Article 2 of the Convention on the Territorial Sea and the Contiguous Zone, 1958. The above brief account of its historical development lends weight to Gidel's opinion, expressed in 1958, that the theory of the territorial sea developed 'par acquisitions successives de droits fragmentaires réunis ensuite en faisceau'.<sup>1</sup> This fragmentary development is still reflected in the fact that the right of innocent passage is impliedly confined to passage on the surface of or through the water mass and does not include passage through the subsoil or airspace.<sup>2</sup> The above account also indicates that the rule for the bed and subsoil of the territorial sea was conceived later than the corresponding rule for the superjacent waters and later even than that for the superjacent airspace, although the subsequent crystallization process resulted in a unitary customary rule and not three separate rules. Finally, the significance of the inclusion of the bed and subsoil in the concept of territorial sea is that it points the way to the theory of continental shelf based upon the natural prolongation of the land territory. To conclude with another quotation from Gidel:

... les droits de l'État riverain sur le sous-sol de la mer territoriale sont des droits qui se rattachent à la condition du milieu terrestre et non pas à celle du milieu maritime.<sup>3</sup>

<sup>1</sup> Gidel, 'Le plateau continental et le principe de la liberté de la haute mer', *Estudios de derecho internacional: Homenaje al Profesor Camilo Barcia Trelles* (1958), p. 234. The author cited in support A. Raested, *La mer territoriale* (1913), p. 162.

<sup>2</sup> The right of innocent passage conferred by Art. 14 of the Convention on the Territorial Sea and the Contiguous Zone, 1958, is limited to 'ships'. In *New South Wales and Others v. Commonwealth of Australia*, (1975) 8 A.L.R. 1, at p. 88, Mason J. stated that 'it is necessary to distinguish between the land territory of a coastal State on the one hand and its territorial sea and solum on the other hand, for the coastal State in the exercise of its sovereign rights is bound to give effect to the obligations relating to the right of innocent passage imposed upon it by the convention in respect of its territorial sea and solum. Accordingly, the territorial rights now conceded by international law to the coastal State in the solum of territorial waters stamp it with the character of territory that is different from the land territory of the coastal State'. With respect, this argument is inaccurate for the solum of the territorial sea.

<sup>3</sup> Gidel, *Le droit international public de la mer*, vol. 3 (1934), p. 331. The author again cited Raestad, this time in the 1930 Hague Codification Conference debate set out earlier in this paper.



# DECISIONS OF BRITISH COURTS DURING 1976–1977 INVOLVING QUESTIONS OF PUBLIC AND PRIVATE INTERNATIONAL LAW

## A. PUBLIC INTERNATIONAL LAW\*

*Multilateral treaties—effect of war on pre-war treaties and Orders in Council—continuity of treaty relations despite territorial and constitutional change—Convention on the Execution of Foreign Arbitral Awards, 1927—Treaty of Peace with Roumania, 1947*

*Case No. 1. Masinimport v. Scottish Mechanical Light Industries Ltd.*, 1976 *Scots Law Times* p. 245, Outer House, Lord Keith. The defenders, a Scottish company, sold flour-milling machinery to the pursuers, a Roumanian State enterprise. The contract contained a provision submitting disputes to arbitration by the Chamber of Commerce of the People's Republic of Roumania. A dispute as to the suitability of the machinery arose, and in due course an arbitration committee of the Bucharest Chamber of Commerce ordered the defenders to repay to the pursuers certain amounts under the contract. The pursuers sought to recover these under Part II of the Arbitration Act 1950, which consolidated legislation implementing the 1927 Convention on the Execution of Foreign Arbitral Awards,<sup>1</sup> which itself applies to awards covered by the 1923 Protocol on Arbitration Clauses.<sup>2</sup> Roumania and the United Kingdom were parties to the 1927 Convention, and an Order in Council under the Arbitration (Foreign Awards) Act 1930 to that effect had been duly made.<sup>3</sup>

The defenders argued that Roumania had ceased to be a party to the 1927 Convention as a result of its involvement in the Second World War, and accordingly that the pursuers were not entitled to rely on Part II of the Arbitration Act; and that in any case enforcement of the decree arbitral was 'contrary to the public policy or the law' of Scotland, under Section 37 (i) (e) of the Act.<sup>4</sup> Lord Keith rejected both arguments, although only the former is of direct concern here.<sup>5</sup>

The argument about termination of the 1927 Convention was put on two different grounds. It was said that the Second World War had the effect of terminating the Convention. The effect of the war on British–Roumanian *bilateral* treaties was regulated by the Roumanian Peace Treaty of 1947,<sup>6</sup> but Lord Keith regarded the position of multilateral treaties such as those of 1923 and 1927 as depending on the rule that 'multipartite law-making treaties survive a war'.<sup>7</sup> In any event the terms of the 1950

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<sup>1</sup> *United Kingdom Treaty Series*, No. 28 (1930) (Cmd. 3655); *League of Nations Treaty Series*, vol. 92, p. 301.

<sup>2</sup> *United Kingdom Treaty Series*, No. 4 (1925); *League of Nations Treaty Series*, vol. 27, p. 157.

<sup>3</sup> 1931 No. 898, maintained in force by s. 35 (3), Arbitration Act 1950.

<sup>4</sup> Applied to Scotland by s. 41 (2). Cf. 1927 Convention, Art. 1 (e), referring to 'the public policy or . . . the principles of the law of the country' in which enforcement is sought.

<sup>5</sup> As to the latter see 1976 *Scots Law Times* at p. 249.

<sup>6</sup> *United Kingdom Treaty Series*, No. 55 (1948) (Cmd. 7486), Art. 10; Note reviving certain pre-war treaties (1948), *British and Foreign State Papers*, vol. 151, p. 82.

<sup>7</sup> 1976 *Scots Law Times* at p. 247, citing McNair, *Law of Treaties* (1961), p. 723; Oppenheim, *International Law*, vol. 2 (7th edn., 1952), p. 304.

Act, in his Lordship's judgment, demonstrated the British view that pre-1939 treaty relations under the two treaties continued to exist.<sup>1</sup> With respect, this was clearly right, although more convincing evidence of the British view, and of its correctness, might perhaps have been given.<sup>2</sup>

Secondly, it was argued that constitutional and territorial changes affecting Roumania in the period 1939-45 had the result that Roumania had ceased to be a party to the Convention. Lord Keith had little difficulty in dismissing this argument:

... it appears to be generally accepted in the field of public international law that such a change [*sc.* in the constitutional character of the sovereign of a particular State] has no effect upon pre-existing treaty rights and obligations. . . . I am therefore of opinion that the constitutional changes in Romania, involving the abolition of the monarchy, did not have the effect that the State of Romania ceased to be a party to the Convention scheduled to the 1950 Act, and I consider that the fact that the Order in Council, dated 17 December 1931, has never been revoked indicates that this position is accepted by the Government of the United Kingdom. I therefore reject this part of the defenders' argument.

Finally, it was argued for the defenders that the loss of certain territory by Romania confirmed in 1947, had the result that s. 35 (1) (c) of the 1950 Act did not apply to the present State of Romania, because its territory was now different from what it was at the time of the Order in Council dated 17 December 1931. I reject this argument also. It is well-settled in public international law that the mere loss of territory has no effect upon the treaty rights and obligations of the State losing the territory . . . Accordingly, I am of opinion that the Order in Council applies to the present reduced territory of the State of Romania, within which the arbitration took place.<sup>3</sup>

Although it is difficult to quarrel with these aspects of his Lordship's judgment, several points must be made. First, it appears to have been assumed that termination of treaty relations between Roumania and the United Kingdom would have resulted in the termination of operation of the relevant Order in Council under Part II of the Act. This might perhaps have been so, in that the Order in Council might have contained an implied suspensive condition to that effect; but it is most doubtful. The existence of an Order in Council was a pre-condition to enforcement of a foreign award under Part II; even if a State was a party to the Convention, enforcement under Part II would not be possible without an Order in Council.<sup>4</sup> Conversely, it is most probable that the existence of an Order in Council was sufficient, as well as necessary, for enforceability under Part II. That would seem to have been a major purpose of the machinery of Orders in Council.<sup>5</sup>

Perhaps a more serious objection is that the machinery of Part II of the 1950 Act has been superseded, as between States declared to be parties to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards,<sup>6</sup> by the

<sup>1</sup> 1976 *Scots Law Times* at pp. 247-8.

<sup>2</sup> For treaty actions pursuant to the 1927 Convention since 1945, see United Nations publication, *Multilateral Treaties . . . Signatures, Ratifications, Accessions, etc. as at 31 December 1975*, p. 520. Cf. Art. VII (2) of the New York Convention of 1958 (*post*, p. 335).

<sup>3</sup> 1976 *Scots Law Times* at p. 248, citing McNair, *op. cit.*, pp. 668-72, 633 ff.; and *Lazard Bros. & Co. v. Midland Bank*, [1933] A.C. 289 at p. 307; this *Year Book*, 14 (1933), pp. 183-7.

<sup>4</sup> Cf. Arbitration Act 1950, s. 35 (b); *Dalmia Cement Co. v. National Bank of Pakistan*, [1975] 1 Q.B. 9 (Kerr J.). Such an award might none the less be enforceable under s. 26 of the 1950 Act: at pp. 19-23 *per* Kerr J. See also Collier, *Cambridge Law Journal*, 33 (1975), pp. 44-7.

<sup>5</sup> The Arbitration Act 1975, s. 7 (2) provides that an Order in Council declaring a State to be a party to the Convention 'shall, while in force, be conclusive evidence' of that fact. Collier (*loc. cit.* (previous note) at p. 47), relying presumably on the word 'evidence', regards s. 7 (2) as allowing *other* evidence of a foreign State's participation in the Convention.

<sup>6</sup> *United Nations Treaty Series*, vol. 330, p. 38.



provisions of the Arbitration Act 1975.<sup>1</sup> The Act came into force on 23 December 1975, the same day as the United Kingdom's ratification of the 1958 Convention,<sup>2</sup> and an Order in Council declaring, *inter alia*, Roumania a party to the Convention,<sup>3</sup> took effect. The supersession, *pro tanto*, of Part II of the 1950 Act by the 1975 Act was in accordance with Article VII (2) of the New York Convention, by which . . .

The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

Presumably the machinery of Part II of the 1950 Act, and the Orders in Council applying under it (which have not been repealed), remain to be invoked both in relation to States not parties to the New York Convention, and in relation to any awards enforceable under the 1927 Convention but not under the New York Convention. It is not clear whether this second category of cases has any content, since the general effect of the 1958 Convention is to expand the range of enforceable awards.<sup>4</sup> But in the case under review the decree arbitral qualified for enforcement under the 1975 Act, and the machinery of the 1950 Act was not, therefore, applicable. Lord Keith's judgment (on 30 January 1976) under the 1950 Act was therefore *per incuriam*; although had his Lordship's attention been directed to the 1975 Act the result would no doubt have been the same.

#### *Sovereignty—territorial sea—Northern Ireland*

*Case No. 2. Director of Public Prosecutions for Northern Ireland v. McNeill & Others* (1975, unreported), Northern Ireland C.A. This case raised, in an unexpected way, issues of the international and constitutional status of the territorial sea around Northern Ireland. A resident magistrate, acting *ex proprio motu*, dismissed a complaint alleging illegal salmon fishing off the Northern Ireland coast (contrary to Section 99 of the Fisheries Act (Northern Ireland) 1966), on the grounds that the territorial waters surrounding Northern Ireland were vested in the Republic of Ireland, and that the United Kingdom Parliament could not validly authorize local legislation over those waters.<sup>5</sup> These issues went by way of case stated to the Northern Ireland Court of Appeal, which unanimously rejected the resident magistrate's decision and remitted the case for decision on the merits.

The grounds on which the resident magistrate dismissed the complaint were in almost every respect legally hopeless, and for at least three reasons. First, and most obvious, is the fundamental principle that United Kingdom legislation, even if violative of international law, will not be regarded as *ultra vires* in British Courts.<sup>6</sup> But neither Lowry L.C.J. nor Jones L.J. in the Court of Appeal<sup>7</sup> were prepared to rest

<sup>1</sup> 1975 c. 3, s. 2. The Act applies to Scotland: s. 3 (1) (b).

<sup>2</sup> Pursuant to Art. XII (2) of the Convention.

<sup>3</sup> 1975 No. 1709.

<sup>4</sup> Thus the equivalent to Art. 1 (e) of the 1927 Convention (*supra*, p. 333 n. 4) refers only to the 'public policy of that country': 1958 Convention, Art. V (2) (b). For the interpretation of Art. V (2) (b) in the United States see Junker, *California Western International Law Journal*, 7 (1977), pp. 288-350.

<sup>5</sup> In this case by the Fishery Limits Act 1964, s. 4.

<sup>6</sup> Transcript of judgment, *per* Lowry L.C.J. at p. 7; *per* Jones L.J. at pp. 16-17, citing *Mortensen v. Peters*, (1906) 8 Fraser 93; *Croft v. Dunphy*, [1933] A.C. 156 at p. 164; *I.R.C. v. Collico Dealings Ltd.*, [1962] A.C. 1 at p. 19; this *Year Book*, 37 (1961), at p. 548.

<sup>7</sup> Curran L.J. concurred with the other members of the Court.



their judgments on this ground alone: each examined in some detail the substantive issues.

The second ground rested essentially on the interpretation of Section 1 (2) of the Government of Ireland Act 1920. Section 1 (1) established Parliaments for Southern and Northern Ireland; Section 1 (2) then stated that . . .

For the purposes of this Act, Northern Ireland shall consist of the parliamentary counties of Antrim, Armagh, Down, Fermanagh, Londonderry and Tyrone, and the parliamentary boroughs of Belfast and Londonderry, and Southern Ireland shall consist of so much of Ireland as is not comprised within the said parliamentary counties and boroughs.

It will be seen that Section 1 (2) defined Northern Ireland in terms of parliamentary counties and boroughs. Like the 'body of a[n English] county', such parliamentary units have always been regarded as ending at the low-water mark.<sup>1</sup> Subsequent British legislation affecting the status of Ireland merely employed the terms 'Southern Ireland' and 'Northern Ireland' without further definition:<sup>2</sup> in particular, the Irish Free State was regarded as, in the events that happened, territorially continuous with 'Southern Ireland' under the 1920 Act.<sup>3</sup> The territorial extent of the Irish Free State after it achieved full independence was thus dependent on the terms of Section 1 (2) of the 1920 Act, certainly in British law but also, *semble*, in international law (since Ireland achieved its independence by grant from the United Kingdom, and its territory was thus, presumably, limited to that contained in the grant).<sup>4</sup> And it was clear that nothing in Section 1 (2) purported to vest the territorial sea of 'Northern Ireland' in the polity then referred to as 'Southern Ireland', for a number of different reasons.

It is established that under British constitutional law, the 'realm' is co-extensive with the land territory and internal waters of the United Kingdom. Other maritime regions, even if subjected to a regime of sovereignty in international law (as is the territorial sea), are regarded at common law as constituting plenary competences or jurisdictions appurtenant to, but not part of, that 'realm'.<sup>5</sup> The historical origins of this position are obscure, and have been extensively debated; but that it constitutes the common law position does not now seem open to doubt.<sup>6</sup> Therefore the term 'Ireland' in Section 1 (2), and as a consequence the residual territory of 'Southern Ireland', just as much as the express definition of Northern Ireland, must be taken to have referred only to land territory. Of course both Parliaments were given power to

<sup>1</sup> *R. v. Keyn*, (1876) 2 Ex. D. 63.

<sup>2</sup> e.g., Irish Free State (Agreement) Act 1922, s. 1 (2), (4); Schedule, ss. 11, 12 ('the provisions of the Government of Ireland Act, 1920 . . . shall, so far as they relate to Northern Ireland, continue to be of full force and effect'), 15; Irish Free State (Consequential Provisions) Act 1922, s. 1 (1); Ireland (Confirmation of Agreement) Act 1925, s. 1 (2); Schedule, s. 1 ('the extent of Northern Ireland for the purposes of the Government of Ireland Act, 1920, and of the said Articles of Agreement, shall be such as was fixed by sub-section (2) of section one of that Act').

<sup>3</sup> e.g., Irish Free State (Agreement) Act 1922, s. 1 (2).

<sup>4</sup> See the discussion on the notion of devolution, *infra*, pp. 134-7.

<sup>5</sup> *R. v. Keyn*, (1876) 2 Ex. D. 63; *Harris v. Owners of the Franconia*, (1877) 2 C.P.D. 173 at p. 177. See generally O'Connell, *International Law* (2nd edn., 1970), vol. 1, pp. 470-4. Cf. *per* Lowry L.C.J. at p. 12.

<sup>6</sup> *United States v. California*, 332 U.S. 19 (1947); *Reference re Offshore Mineral Rights*, (1967) 65 D.L.R. (2nd) 353; *Bonser v. La Macchia*, (1969) 122 C.L.R. 177 *per* Barwick C.J. at pp. 184-9; *New South Wales v. Commonwealth*, (1975) 50 A.L.J.R. 218. Irish counties have been held not to extend beyond low-water mark: *Smyth v. Dun Laoghaire B.C.* (1959), *International Law Reports*, vol. 30, p. 90; *Canning v. Donegal C.C.* (1960), *ibid.*, p. 100. See also the note by Marston, *Cambridge Law Journal*, 34 (1976), pp. 6-9.

legislate on maritime matters, subject to extensive 'imperial' reservations; but this, as their lordships pointed out,<sup>1</sup> was itself inconsistent with an investment in one entity of the other's territorial sea. In summary . . .

the 1920 Act was designed to set up two subordinate states . . . each with similar constitutions and similar types of government and if that be so it would be very surprising if one of these subordinate states, namely Southern Ireland, should be said to have been given the territorial waters surrounding the whole of Ireland or the rights therein to the exclusion of any rights therein of either Great Britain or Northern Ireland.<sup>2</sup>

Thirdly, although the Republic of Ireland Constitution itself lays formal claim to sovereignty over 'the whole island of Ireland',<sup>3</sup> it is clear that the Republic does not claim the territorial waters of Northern Ireland independently of its claim to sovereignty over the land. Indeed the conclusion of the European Fisheries Convention of 1964<sup>4</sup> (implemented by the Fishery Limits Act 1964)<sup>5</sup> itself constituted express Irish recognition of the United Kingdom's sovereignty over the territorial seas around Northern Ireland.<sup>6</sup> Even if a legal possibility,<sup>7</sup> the separation of territorial sovereignty from maritime jurisdiction was therefore untenable in the case of Northern Ireland in international, no less than municipal, law.

*Municipal law—relation to international convention—International Monetary Fund—Article VIII 2 (b)—'Exchange Contract'—interpretation*

*Case No. 3. Wilson, Smithett & Cope Ltd. v. Terruzzi*, [1976] 2 W.L.R. 418; [1976] 1 All E.R. 817; [1976] 1 Ll.L. R. 509, C.A. The decision of Kerr J. in this case was noted briefly in the last volume of this *Year Book*.<sup>8</sup> The sole point of substance in a totally unmeritorious defence was whether the defendant's failure to obtain exchange control approval from the Italian authorities rendered his speculative transactions in metal futures unenforceable under Article VIII (2) (b) of the Bretton Woods Fund Agreement<sup>9</sup> as implemented by the Bretton Woods Agreement Order in Council.<sup>10</sup> Kerr J. thought not, preferring the restrictive meaning of the term 'exchange contracts' in Article VIII (2) (b) as contracts for the exchange of currency,<sup>11</sup> rather than the extensive view, adopted *obiter* by Lord Denning M.R. in *Sharif v. Azad*, as those 'which in any way affect the country's exchange resources'.<sup>12</sup> The latter view, with the influential

<sup>1</sup> Transcript of judgment, *per* Lowry L.C.J. at pp. 13-14; *per* Jones L.J. at pp. 8-11.

<sup>2</sup> *Per* Jones L.J. at p. 7.

<sup>3</sup> Constitution of Ireland (1937), Art. 2; Peaslee, *Constitutions of Nations* (rev. 3rd edn., 1968), vol. 3, p. 463. No such claim was made in the Irish Free State Constitution Act 1922 (U.K.), or in the original Constitution scheduled thereto.

<sup>4</sup> *United Kingdom Treaty Series*, No. 35 (1966) (Cmd. 3011).

<sup>5</sup> *Supra*, p. 335 n. 5.

<sup>6</sup> *Per* Lowry L.C.J. at pp. 7-9; *per* Jones L.J. at pp. 11-12. Art. 2, in conjunction with Annex I, expressly recognizes a territorial sea of Northern Ireland. Art. 13 provides for arbitration of disputes 'concerning the interpretation or application' of the Convention.

<sup>7</sup> See the discussion by Symmons, 'Who Owns the Territorial Waters of Northern Ireland?' *Northern Ireland Legal Quarterly*, 27 (1976), pp. 48-66 at pp. 61-5.

<sup>8</sup> This *Year Book*, 47 (1974-5), at pp. 350-2.

<sup>9</sup> *United Nations Treaty Series*, vol. 2, p. 39; *United Kingdom Treaty Series*, No. 21 (1946) (Cmd. 6885).

<sup>10</sup> 1946 No. 36, made pursuant to the Bretton Woods Agreements Act 1945, s. 3 (1).

<sup>11</sup> [1976] 1 Q.B. 683 at pp. 701-2, referring *inter alia* to Nussbaum, *Yale Law Journal*, 59 (1950), pp. 421-30.

<sup>12</sup> [1967] 1 Q.B. 605 at p. 613.



support of Dr. Mann,<sup>1</sup> has probably been the predominant one,<sup>2</sup> but Kerr J.'s restrictive view was affirmed, with emphasis, by all three members of the Court of Appeal.<sup>3</sup> The argument for the appellant in the Court of Appeal had become avowedly teleological: the court was urged . . .

to look at article VIII, section 2 (b), as a whole, in its setting in an international treaty, which represents one of the greatest achievements of inter-state co-operation, and give it the widest possible interpretation in order to promote the objects of the I.M.F. agreement.<sup>4</sup>

There were two main problems with this approach. First, it involved giving no meaning at all to the word 'exchange': as one writer put it, "'exchange contracts" ought to be read simply as "contracts"'.<sup>5</sup> This procedure Shaw L.J. described as 'not interpretation but mutilation'.<sup>6</sup> Secondly, it involved a strong commitment to a view of the 'paramount purpose' of the Agreement, and Article VIII (2) (b) in particular: that of international monetary co-operation, and especially the mutual protection of currency control regulations.<sup>7</sup> But the purposes of the Fund Agreement, as set out in Article 1, were diverse and general: they included the promotion of international trade (Article 1 (ii)) and the 'elimination of foreign exchange restrictions which hamper the growth of world trade' (Article 1 (iv)). The consequences of a broad interpretation of Article VIII (2) (b) could hardly have contributed to either end.<sup>8</sup> As Shaw L.J. pointed out . . .

if some special or extended or unusual meaning was intended to be given to 'exchange contracts' for the purposes of article VIII, section 2(b), the term would have been given by express provision whatever was the appropriate definition required. As it is, one can only have recourse to the dictionary where one of the meanings of 'exchange' is defined as giving currency for currency. The absence of any legal definition from article XIX reinforces the view that the narrow or ordinary or natural meaning is the right one to adopt and that its validity does not become suspect merely because it is also elementary. It may give rise to some anomalies but this is hardly a surprising outcome of an attempt to rationalise an international system of immense complexity. The anomalies which would result from a wider interpretation, whatever it was, would be of a far higher order of magnitude; and to broaden the scope of article VIII, section 2(b), would threaten and not foster the totality of the purposes set out in article I.<sup>9</sup>

Two further points may be made. Although the term 'exchange contract' refers primarily to contracts providing in terms for the exchange of currency, their Lordships agreed with Nussbaum that this category included 'monetary transactions in disguise':<sup>10</sup>

<sup>1</sup> *The Legal Aspect of Money* (3rd edn., 1971), pp. 439-48 at p. 441.

<sup>2</sup> Krispis, *Recueil des cours*, 120 (1967-I), pp. 191-312 at pp. 286-90; Lipstein, *Cambridge Law Journal*, 34 (1976), pp. 203-5, and works there cited.

<sup>3</sup> The Appeal Committee dismissed an application for leave to appeal to the House of Lords: [1976] 1 Q.B. at p. 725.

<sup>4</sup> At p. 717 *per* Ormrod L.J.

<sup>5</sup> Krispis, loc. cit. (above, n. 2), at p. 288.

<sup>6</sup> [1976] 1 Q.B. at p. 724; cf. Ormrod L.J. at p. 718.

<sup>7</sup> Provided, of course, that the regulations were 'maintained or imposed consistently with' the Fund Agreement: the court preferred to express no view on this question. See especially *per* Ormrod L.J. at p. 719; cf. Kerr J. at pp. 694-7.

<sup>8</sup> In any event it is not clear that the transactions here 'involve[d] the currency' of Italy, since payment in sterling was required, and for all the plaintiff knew the defendant might have had bank accounts in England from which to pay his account.

<sup>9</sup> [1976] 1 Q.B. at p. 772. But for criticism see Lipstein, *Cambridge Law Journal*, 34 (1976), pp. 203-5.

<sup>10</sup> *Yale Law Journal*, 59 (1950), at p. 427.



that is, 'contracts which, though ostensibly made for other purposes, had the object and ultimate outcome of bringing about an exchange of currencies'.<sup>1</sup> How the courts are to penetrate the disguise, in such cases, was not made clear.<sup>2</sup>

Secondly, although no broad 'teleological' interpretation was adopted,<sup>3</sup> their Lordships showed at least some signs of abandoning strict common law doctrines of statutory interpretation in favour of the rather more flexible international law rules of interpretation of treaties. It was, for example, agreed that as 'liberal a construction as possible' should be accorded to provisions in international agreements.<sup>4</sup> In particular, uniformity of interpretation of such provisions between jurisdictions was of value, though less so here since the decisions were conflicting.<sup>5</sup> And two of their Lordships made at least some passing reference to the *travaux préparatoires* of the Fund Agreement, a procedure which seems to be entirely prohibited at common law in the interpretation of statutes,<sup>6</sup> but which is generally agreed to be permissible in the interpretation of ambiguous or unclear treaty provisions.<sup>7</sup> With respect, such flexibility is welcome.

### *Municipal law—relation to international convention*

*Case No. 4. The Jade; The Eschersheim*, [1976] 2 Ll. L. R. 1; [1976] 1 All E.R. 920; [1976] 1 W.L.R. 430, H.L.; affirming [1976] 1 All E.R. 441; [1976] 1 W.L.R. 339; [1976] 1 Ll. L. R. 81, C.A.; affirming [1974] 2 Ll. L. R. 188, Brandon J. The Brussels Convention of 1952 relating to the Arrest of Sea-Going Ships<sup>8</sup> provides in Article 1 (1) an exhaustive list of claims with respect to which ships within the jurisdiction of Contracting States may be arrested. Part I of the Administration of Justice Act 1956 was intended, *inter alia*, to implement the Convention with respect to England and Wales. Section 1 (1) lists claims within the admiralty jurisdiction of the High Court: Section 3 (4) then provides for actions *in rem* to be brought in certain of the cases set out in Section 1 (1). With some exceptions<sup>9</sup> these cases parallel those in Article 1 (1) of the Brussels Convention. However, the terms of the 1952 Convention were not set out *verbatim* in Part I; instead a rather unusual procedure was adopted, succinctly described by Lord Diplock:

The way in which the draftsman of Part I of the Administration of Justice Act, 1956, set about his task of bringing the right of arrest of a ship in an action *in rem* in the English Courts into conformity with art. 3 of the convention was (a) by s. 1 of the Act, to substitute a fresh list of claims falling within the Admiralty jurisdiction of the High Court, and (b) by s. 3, to regulate the right to bring an action *in rem* against a ship by reference to the claims so listed. . . . Apart from the addition of claims in respect of salvage, towage and pilotage of aircraft (which in any event are not subject to the convention),

<sup>1</sup> [1976] 1 Q.B. at p. 725 *per* Shaw L.J.; cf. Lord Denning M.R. at p. 714; Ormrod L.J. at p. 718.

<sup>2</sup> But cf. Merrills, *International and Comparative Law Quarterly*, 26 (1977), p. 218 at p. 223.

<sup>3</sup> Cf. Case No. 5, *infra*.

<sup>4</sup> [1976] 1 Q.B. at p. 717 *per* Ormrod L.J.

<sup>5</sup> At p. 712 *per* Lord Denning M.R.; at pp. 716-17 *per* Ormrod L.J.

<sup>6</sup> See Cross, *Statutory Interpretation* (1976), pp. 129-41, for a recent discussion of the rule.

<sup>7</sup> Vienna Convention on the Law of Treaties (1969), A/CONF. 39/27, & corr.: 1, Art. 32; and see generally Lauterpacht, *The Development of International Law by the International Court* (1958), pp. 116-41; McNair, *Law of Treaties* (1961), pp. 411-23.

<sup>8</sup> *United Kingdom Treaty Series*, No. 47 (1960) (Cmd. 1128).

<sup>9</sup> e.g. s. 1 (1) (e) ('any claim for damage received by a ship'); as to which see Lord Diplock, [1976] 2 Ll. L. R. at p. 9.

there is again no significant difference between what is contained in the new list and what was contained in the 1925 list, except that the language is rather more succinct and a little closer to the language of art. 1 of the convention. In contrast to what the English draftsman did, the draftsman of Part V of the 1956 Act, which deals with the Scots Courts, was content merely to list in s. 47 (2) the claims in respect of which a warrant might be issued for the arrest of a ship; and in doing so he followed much more closely than his English counterpart the language and order of art. 1 of the convention.

One is thus confronted with three lists of claims by reference to which a right of arrest of a ship in an action in rem may be regulated: (1) the English list in s. 1 of the Act; (2) the Scottish list in s. 47 of the Act; and (3) the international list in art. 1 of the convention. Except that both English and Scottish lists refer to claims for 'damage received by a ship' as well as for damage done by one and the English list includes some services rendered to aircraft, whereas the international list does not, all three lists cover the same ground though with some variations in language and in order.<sup>1</sup>

In addition, the Act itself made no reference at all to the Brussels Convention. None the less, it was accepted by Lord Diplock (with whom the other members of the House of Lords concurred), and by a majority of the Court of Appeal,<sup>2</sup> that the courts could properly refer to the convention in interpreting the Act. In the words of Lord Diplock:

As the Act was passed to enable H.M. Government to give effect to the obligations in international law which it would assume on ratifying the convention to which it was a signatory, the rule of statutory construction laid down in *Salomon v. Customs and Excise Commissioners*, [1967] 2 Q.B. 116, and *Post Office v. Estuary Radio Ltd.*, [1968] 2 Q.B. 740, is applicable. If there be any difference between the language of the statutory provision and that of the corresponding provision of the convention, the statutory language should be construed in the same sense as that of the convention if the words of the statute are reasonably capable of bearing that meaning.

In the instant case the obligation assumed by H.M. Government under the convention was to give effect to it in all three jurisdictions of the United Kingdom. So there is also a presumption that the Act was intended to have the same consequences as respects the right of arrest of ships in Scotland as it has in England. Accordingly, if the language used in the English list is capable of more than one meaning that meaning is to be preferred that is consistent with the language used to describe the corresponding claim in the Scottish list.<sup>3</sup>

In this case the Convention was useful in two different ways. First, it enabled the Court to give the same meaning to different words in Parts I and V of the Act, because it could not be presumed that Parliament intended to implement a convention designed to procure uniformity in different ways in England and Scotland.<sup>4</sup> Secondly, it lent weight to the interpretation of the terms appearing in both the Convention and the Act<sup>5</sup> in their ordinary and natural meaning, despite the fact that the same words in

<sup>1</sup> At p. 6.

<sup>2</sup> [1976] 1 Ll. L.R. at pp. 90-1 *per* Scarman L.J.; at pp. 92-3 *per* Sir Gordon Willmer. Cf. [1974] 2 Ll. L.R. p. 192 *per* Brandon J. *Contra*, [1976] 1 Ll. L.R. at p. 86 *per* Cairns L.J., not apparently on any ground of principle but because no assistance was provided by the Convention in this case.

<sup>3</sup> [1976] 2 Ll. L.R. at p. 6.

<sup>4</sup> *Ibid.*; cf. [1976] 1 Ll. L.R. at p. 90 *per* Scarman L.J.; [1974] 2 Ll. L.R. at pp. 193-4 *per* Brandon J. *Contra*, [1976] Ll. L.R. at p. 86 *per* Cairns L.J.

<sup>5</sup> e.g. 'any claim arising out of any agreement relating . . . to the use or hire of a ship': s. 1 (1) (h); cf. Convention, Art. 1 (1) (d).

earlier British legislation had been given a more restrictive meaning.<sup>1</sup> It thus seems that the presumption of consistency with a convention may override the presumption that re-enacted words bear the meaning given them by the courts prior to their re-enactment.<sup>2</sup>

The emphasis given the terms of the Convention, in both the Court of Appeal and the House of Lords, would seem to have answered in the affirmative the question whether one can refer to a convention not itself referred to in the implementing Act. The other view has sometimes been preferred,<sup>3</sup> but there would seem to be little justification in rejecting the assistance which the convention may give.<sup>4</sup> Apparently, the courts will take judicial notice of the fact that particular legislation implements a convention, even where, as here, their language is by no means identical.

*Municipal law—relation to international convention—‘progressive’ interpretation—desirability of uniform interpretation of treaty provisions—interpretation by reference to French text of convention*

*Case No. 5. James Buchanan & Co. Ltd. v. Babco Forwarding & Shipping (U.K.) Ltd.*, [1977] 2 W.L.R. 107; [1977] 1 All E.R. 518; [1977] 1 Ll. L.R. 234, C.A. When whisky is dispatched in bond in the United Kingdom for export, no local excise duty is payable; however, duty becomes payable under Section 85 of the Customs and Excise Act 1952 if the whisky is ‘unlawfully abstracted’. Here the plaintiff’s whisky was stolen while in the custody of the defendants and as a result of the negligence of their servant. The sole question was whether the plaintiff could recover only the value of the whisky when it was loaded, or also the amount of the excise they were later required to pay under Section 85 as a result of the loss. At common law it is clear that both would have been recoverable; but the carriage here was governed by the Carriage of Goods by Road Act 1965, section 1 of which provided that the provisions of the Convention on the Contract for the International Carriage of Goods by Road<sup>5</sup> should ‘have the force of law in the United Kingdom’ in respect of contracts governed by the Convention. The Convention established rules for assessment of loss quite different from those at common law. Article 23 provided in part:

1. When, under the provisions of this Convention, a carrier is liable for compensation in respect of total or partial loss of goods, such compensation shall be calculated by reference to the value of the goods at the place and time at which they were accepted for carriage.
2. The value of the goods shall be fixed according to the commodity exchange price or, if there is no such price, according to the current market price or, if there is no commodity exchange price or current market price, by reference to the normal value of goods of the same kind and quality.

...

4. In addition, the carriage charges, Customs duties and other charges incurred in respect of the carriage of the goods shall be refunded in full in case of total loss and in

<sup>1</sup> Cf. [1976] 2 Ll. L.R. at p. 8 *per* Lord Diplock.

<sup>2</sup> Brandon J. had thought that the latter presumption would usually prevail: [1974] 2 Ll. L.R. at p. 192; but, apparently, that this case constituted an exception: at p. 195.

<sup>3</sup> e.g. by Roskill and Ormrod L.JJ. in *Benin v. Whimster*, [1975] 3 W.L.R. 542 at pp. 554-5, 558. *Contra* Lord Denning M.R. at p. 550. See the note, this *Year Book*, 47 (1974-5), at pp. 346-7.

<sup>4</sup> In insular terms, the convention expresses in an unusually precise way the ‘mischief’ designed to be remedied by the Act, and under the rule in *Heydon’s case*, (1584) 3 Co. Rep. 7b, the courts can inquire into the surrounding circumstances whether or not these are referred to in the Act.

<sup>5</sup> Geneva, 19 May 1956: *United Kingdom Treaty Series*, No. 90 (1967) (Cmd. 3455).



proportion to the loss sustained in case of partial loss, but no further damages shall be payable.

Assuming that the 'value of the goods at the place and time at which they were accepted for carriage' did not include the amount of duty subsequently payable, two questions arose. Was that duty to be included in the 'current market price' or 'normal value of goods of the same kind and quality' under paragraph 2 of Article 23, and if not, was the duty a 'charge incurred in respect of the carriage of goods' under paragraph 4? As to the first question the answer was reasonably clear: the 'normal value' of the goods was their value at the time and place of acceptance, therefore excluding any duty which might subsequently become payable.<sup>1</sup>

The remaining and more interesting question was the meaning of paragraph 4. In determining this question their Lordships referred to three different principles of interpretation for assistance.

Lord Denning M.R. repeated his view of the need for a 'European approach'<sup>2</sup> to legislation implementing conventions:

We must, therefore, put on one side our traditional rules. We have for years tended to stick too closely to the letter—to the literal interpretation of the words. We ought, in interpreting this convention, to adopt the European method. . . . They adopt a method which they call in English by strange words—at any rate they were strange to me—the 'schematic and teleological' method of interpretation. It is not really so alarming as it sounds. All it means is that the judges do not go by the literal meaning of the words or by the grammatical structure of the sentence. They go by the design or purpose which lies behind it. When they come upon a situation which is to their minds within the spirit—but not the letter—of the legislation, they solve the problem by looking at the design and purpose of the legislature—at the effect which it was sought to achieve. They then interpret the legislation so as to produce the desired effect. This means that they fill in gaps, quite unashamedly, without hesitation. They ask simply: what is the sensible way of dealing with this situation so as to give effect to the presumed purpose of the legislation? They lay down the law accordingly. If you study the decisions of the European Court, you will see that they do it every day. To our eyes—shortsighted by tradition—it is legislation, pure and simple. But, to their eyes, it is fulfilling the true role of the courts. They are giving effect to what the legislature intended, or may be presumed to have intended. I see nothing wrong in this. Quite the contrary. It is a method of interpretation which I advocated long ago in *Seaford Court Estates Ltd. v. Asher* [1949] 2 K.B. 481, 498-499. It did not gain acceptance at that time. It was condemned by Lord Simonds in the House of Lords in *Magor and St. Mellons Rural District Council v. Newport Corporation* [1952] A.C. 189, 191, as a 'naked usurpation of the legislative power'. But the time has now come when we should think again. In interpreting the Treaty of Rome (which is part of our law) we must certainly adopt the new approach. Just as in Rome, you should do as Rome does. So in the European Community, you should do as the European Court does. So also in interpreting an international convention (such as we have here) we should do likewise. We should interpret it in the same spirit and by the same methods as the judges of the other countries do. So as to obtain a uniform result. Even in interpreting our own legislation, we should do well to throw aside our traditional approach and adopt a more liberal attitude. We should adopt such a construction as will 'promote the general legislative purpose' underlying the provision. This has been recommended by Sir David Renton and his colleagues in their most

<sup>1</sup> [1977] 2 W.L.R. at p. 111 *per* Lord Denning M.R.; at pp. 116-17 *per* Roskill L.J.; at p. 120 *per* Lawton L.J.

<sup>2</sup> Cf. his *dicta* in *H.P. Bulmer Ltd. v. J. Bollinger S.A.*, [1974] Ch. 401 at pp. 425-6, in a case in which, none the less, the Court of Appeal took a fairly restricted view of Article 177 of the Treaty of Rome.

valuable report on The Preparation of Legislation (1975) (Cmnd. 6053) 135-148. There is no reason why we should not follow it at once without waiting for a statute to tell us.<sup>1</sup>

Both Roskill<sup>2</sup> and Lawton L.J.<sup>3</sup> concurred in the need for a liberal interpretation of 'European' conventions, and, *semble*, of international conventions generally.<sup>4</sup> As a consequence, it was said,

one should not in construing the text of an international convention, even when scheduled to a United Kingdom statute, apply the *ejusdem generis* rule. . . . That rule of construction is a peculiarity of English law.<sup>5</sup>

In part as a corollary, all their Lordships thought that

an agreed text in an international convention . . . should be given the same interpretation in all the countries who were parties to the convention. It would be absurd that the courts of England should interpret it differently from the courts of France, or Holland, or Germany. Compensation for loss should be assessed on the same basis, no matter in which country the claim is brought.<sup>6</sup>

Here, however, no relevant decisions of foreign courts had been discovered.<sup>7</sup>

Thirdly, and most usefully, the courts could refer to the equally authoritative French text of Article 23 (4) in case of doubt. Read literally, the English phrase 'charges incurred in respect of the carriage of the goods' could well exclude the consequential liability to duty here; but the French text has 'les autres frais encourus à l'occasion du transport de la marchandise',<sup>8</sup> a much more general expression.

It follows from the French words that the intention of Article 23 is to provide an indemnity subject to limits. As there is a latent ambiguity in the word 'compensation' as used in what purports to be an exact reflection in English of what is in the French text, in my judgment this court can look at the French text to resolve that ambiguity. This was done by this court in *Post Office v. Estuary Radio Ltd.*, [1968] 2 Q.B. 740, per Diplock L.J. at p. 760.

Since the object of Article 23 is to give an indemnity subject to limits, the principal limits being a financial ceiling and the exclusion of consequential damage, it seems to me that paragraph 4 of Article 23 should be construed broadly . . . The words 'les autres frais encourus à l'occasion du transport' in my understanding cover more than the English translation of 'other charges in respect of the carriage of the goods'. The inference which an English lawyer would normally draw from the use of the word 'charges' twice in one sentence in a statute, namely, that 'other charges' must bear some relation in meaning to 'carriage charges' so as to bring them within the same genus if not the same species, is dissipated by the use of different words in the French text. It is pertinent to remember that the courts of many of the High Contracting Parties to this Convention would turn to the French text, not the English. It would be a sorry state of affairs if, because of differences of construction, the owner of whisky and tobacco being carried in a container lorry from the United Kingdom to a continental destination could not in the English courts claim from the carrier repayment of the excise duty on any whisky stolen in England but might be able to do so in the French courts in respect of the sums, if any, payable on tobacco stolen in France, where there is a state monopoly in that commodity.

<sup>1</sup> [1977] 2 W.L.R. at pp. 112-113.

<sup>2</sup> At p. 119.

<sup>3</sup> At p. 120.

<sup>4</sup> Cf. *supra*, p. 339 n. 4 to the same effect; but contrast Case No. 7, *post*.

<sup>5</sup> At p. 118 *per* Roskill L.J. To the same effect, Lawton L.J. at p. 120.

<sup>6</sup> At p. 112 *per* Lord Denning M.R.; cf. at pp. 114, 119 *per* Roskill L.J.; at p. 120 *per* Lawton L.J. (referring to 'international comity').

<sup>7</sup> Cf. *supra*, p. 339 n. 5.

<sup>8</sup> Only the English text was scheduled to the 1965 Act, which moreover did not reproduce the attestation clause by which the English and French texts were declared 'equally authentic'.



The French phrase 'encourus à l'occasion' conveys the concept of 'arising from', 'occasioned by' or 'resulting from'. The French text has convinced me that the words in the English version of paragraph 4 of Article 23 should be construed as meaning 'any other expenses which the owner of the goods has to pay as a result of the carriage of the goods'. The payment by the plaintiffs of excise duty was just such an expense.<sup>1</sup>

The plaintiffs were accordingly entitled to recover.

The 'principles of interpretation' of treaty provisions enunciated in *Buchanan's* case have since been the subject of scrutiny by a different division of the Court of Appeal. In *Ulster-Swift Ltd. v. Taunton Meat Haulage Ltd.*,<sup>2</sup> the claims concerned Articles 17 and 18 of the Convention on the Contract for the International Carriage of Goods by Road. The precise problems of interpretation involved in what the court emphasized were 'the tortuous paths of articles 17 and 18'<sup>3</sup> need not concern us here. However, Megaw L.J. (who delivered the judgment of the Court)<sup>4</sup> had occasion to refer to each of the three 'principles' enunciated in *Buchanan's* case. His Lordship stated that the court

should willingly have looked at the text of the Convention in the French language to see whether it would provide any assistance on any doubtful questions as to the meaning of the Convention. But counsel, when the point was raised, did not invite the court to take that course, presumably because, in their view, it would not help as regards articles 17 and 18. We have not, therefore, looked at the French text. If we had done so, and if we had thought that it did shed light on the matter, it would have been necessary, despite the added delay and expense, to have given counsel the opportunity to make submissions relating to the court's provisional views, based on the French text.<sup>5</sup>

This was the most specific, and therefore the most helpful, canon of interpretation referred to in *Buchanan's* case, and its reaffirmation is therefore to be welcomed. However, in respect of the other two propositions the court was less enthusiastic. Their Lordships did accept a duty to interpret an international Convention, so far as possible, 'with a view to promoting the objectives of uniformity in its interpretation and application in the courts of the States which are parties to the Convention'.<sup>6</sup> But, they lamented,

in arriving at the decision in the *James Buchanan* case, that other division of this court had the advantage that—so they had been told by counsel—no decision of any court of any other State was known to exist regarding the articles of the Convention which they were required to interpret. In our case there are, as being possibly relevant, at least 30 decisions, which are said to offer 12 different interpretations based on the presumed purpose of the legislation. So our task, on the new approach, is not so simple. There can be no one clear view as to the presumed purpose of the legislation in respect of some parts at least of these articles. In the circumstances, counsel for Fransen, rightly we think, did not invite us to consider in detail the 30 decisions or the rival interpretations; he merely called our attention to their divergence in order to explain why he did not think it helpful to seek to expound them to us.<sup>7</sup>

<sup>1</sup> At pp. 121-2 *per* Lawton L.J.; cf. at p. 118 *per* Roskill L.J. Cf. Vienna Convention on the Law of Treaties (1969), Art. 33 (4). Lord Denning M.R. made no direct reference to the French text, preferring to rely on a teleological interpretation of Art. 23 (4), there being 'a gap . . . at any rate in the English version of it': at p. 113.

<sup>2</sup> [1977] 1 W.L.R. 625, affirming *Donaldson J.*, [1975] 2 Ll.L.R. 502.

<sup>3</sup> [1977] 1 W.L.R. at p. 635.

<sup>4</sup> Megaw, Stephenson and Browne L.JJ.

<sup>5</sup> At p. 632.

<sup>7</sup> At p. 632, citing Wijffels, *European Transport Law*, 11 (1976), p. 208.

<sup>6</sup> At p. 628.



A principle of uniform interpretation would seem to be of doubtful value if the courts are driven to regret that the conditions have arisen for its application. But of course the principle can only apply when the decisions in question are uniform; here they were not, so the question did not arise.

However, these uncertainties also led the court to question—at least covertly—the validity of Lord Denning's 'European approach' to international interpretation. Megaw L.J. observed that the various conflicting decisions had

no doubt, been arrived at on the basis of the approach of European judges, recently praised by Lord Denning M.R. . . . That approach, as advocated by the Master of the Rolls, in contrast with the 'shortsighted' traditional English approach, is to ask oneself: 'What is the sensible way of dealing with this situation so as to give effect to the presumed purpose of the legislation?' We shall, of course, seek loyally to follow that approach, in accordance with the guidance offered in that decision by another division of this court in relation to the international Convention. . . .

But a possible danger of that approach, of which an example is to be found in the judicial decisions to which we have referred, is not, indeed, that the judges become legislators, but that they may become legislators with widely differing, and perhaps unduly legalistic, views of the policy which is, or ought to be, behind the legislation. Hence the law, whatever it may gain in other respects, may in some cases suffer a loss in what has always been regarded as one of the essential features of law—uniformity; or, at least, predictability. Sometimes, in relation to the judicial view of 'the presumed purpose of the legislation', it may be a case of *quot judices, tot sententiae*: whereas, in relation to what the legislation has actually said, it is unlikely that judicial opinion would vary so widely. The danger of lack of predictability, of uniformity, is of course much less serious in a legal system where the doctrine of precedent is an important element, or where there is one Supreme Court whose decision will be accepted as binding by all other courts concerned in the interpretation of the law in question. That, one hopes, will apply in general to European Community matters: but it does not apply in respect of this Convention.<sup>1</sup>

The contrast between *Buchanan's* case and *Ulster-Swift* demonstrates perhaps nothing so much as the difficulty of attempting, judicially or otherwise, to establish a single approach to the interpretation of legislation, whether that approach be liberal or literal. The most that can be achieved, it seems, is a *presumption* of a liberal or flexible approach to legislation implementing conventions; a position scarcely different from an enlightened attitude to interpretation generally.

*Municipal law—relation to international convention—whether unimplemented convention relevant to validity of exercise of discretion by Secretary of State*

Case No. 6. *Pan-American World Airways Inc. v. Department of Trade*, [1976] 1 Ll. L.R. 257, C.A.; reversing [1975] 2 Ll. L.R. 345, Donaldson J. In various cases discussed here,<sup>2</sup> and many others like them, the courts have referred to international conventions for the purpose of interpreting Acts of Parliament. Such cases fall into two broad categories: either the Act implements the convention, in which case one can refer to the convention in aid of the interpretation of the Act,<sup>3</sup> apparently whether or not the Act itself expressly refers to the convention;<sup>4</sup> or the Act deals with a subject matter with respect to which the United Kingdom has accepted international obligations

<sup>1</sup> At pp. 631-2.

<sup>2</sup> *Supra*, Cases Nos. 3-5.

<sup>3</sup> The 'rule' in *Salomon v. Commissioners of Customs & Excise*, [1967] 2 Q.B. 116; this *Year Book*, 42 (1967), pp. 291-3.

<sup>4</sup> *Supra*, p. 341.

under a convention, in which case one can refer to the convention to resolve doubt or uncertainty as to the meaning of the Act, on the basis that Parliament is presumed not to intend to violate international obligations of the United Kingdom.<sup>1</sup> Although both categories might justify recourse to a convention in a particular case, their rationales are quite distinct. In particular in the latter category one would have thought reference to a subsequent convention in general irrelevant, since the question is always what Parliament intended at the time the Act was passed, and international obligations accepted subsequently (unless in some way contemplated by the terms of the Act) would have no bearing at all on this presumed intent.

Assuming, for the moment,<sup>2</sup> the validity of this distinction, the question arises whether there is any further way in which the courts may use an international convention in the interpretation or application of a statute. In this case it was argued that a discretion conferred on the Secretary of State to impose conditions on operating permits granted under the Air Navigation Order 1974 had been in some way limited by the terms of a bilateral treaty entered into by the United Kingdom.

Section 8 (1) of the Civil Aviation Act 1949, which is expressed 'to provide for giving effect to the Chicago Convention<sup>3</sup> and to make further provision for the regulation of Air Navigation', authorizes Orders in Council

(e) as to the conditions under which, and in particular the aerodromes to or from which, aircraft entering or leaving the United Kingdom may fly, and as to the conditions under which aircraft may fly from one part of the United Kingdom to another;

(f) as to the conditions under which passengers and goods may be carried by air and under which aircraft may be used for other commercial, industrial or gainful purposes, and for prohibiting the carriage by air of goods of such classes as may be specified in the Order. . . .

In this case, Article 79 of the Air Navigation Order 1974<sup>4</sup> provided that

An aircraft registered in a Contracting State other than the United Kingdom, or in a foreign country shall not take on board or discharge any passengers or cargo in the United Kingdom, being passengers or cargo carried or to be carried for hire or reward, except with the permission of the Secretary of State granted under this Article to the operator or the charterer of the aircraft or to the Government of the country in which the aircraft is registered and in accordance with any conditions to which such permission may be subject.

Article 60 gave power to vary the conditions attached to operating permits under Article 79. The machinery established by the Act and the Order was itself quite clearly contemplated, and so far as was necessary authorized by Article 6 of the Chicago Convention, by which

No scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization.

After a dispute within the industry over the rate of commission on tickets to be paid to travel agents, the Secretary of State purported to vary the plaintiff's operating permit to require a fixed commission, and no more, to be paid. That requirement was fairly

<sup>1</sup> See Maxwell, *The Interpretation of Statutes* (12th edn., 1969), pp. 183-6, for discussion of the presumption.

<sup>2</sup> But cf. Roskill L.J., *post*, p. 350.

<sup>3</sup> International Convention on Civil Aviation, Chicago, 7 December 1944: *United Kingdom Treaty Series*, No. 8 (1953) (Cmd. 8742).

<sup>4</sup> 1974 No. 1114.



clearly a 'condition under which passengers may be carried by air' under Section 8 (1) (f) of the Act; and neither the Order itself nor the Chicago Convention imposed any limitations at all on the conditions which might be imposed on carriers operating into the United Kingdom. However the plaintiffs relied on paragraph (9) of Part II of the Annex to the Bermuda Agreement of 1946,<sup>1</sup> by which 'rates' to be charged by carriers operating between the United States and the United Kingdom required the approval of the Contracting Parties. On the basis that the Bermuda Agreement was indeed relevant to the case, Donaldson J. held that the term 'rates' in Part II excluded the commission to be paid to travel agents,<sup>2</sup> and that the purported variation in the plaintiff's operating permit was therefore *ultra vires*. The crucial step in this reasoning, clearly, was the proposition that the Bermuda Agreement was relevant at all. His Lordship arrived at that conclusion in the following way:

Whilst the Chicago Convention suggests that Her Majesty's Government has retained complete and unfettered freedom to refuse to allow the operation of scheduled flights by foreign airlines, the Government is also bound by various bilateral agreements. That which is relevant for present purposes is the agreement made in 1946 with the Government of the United States of America commonly known as the Bermuda Agreement.

This agreement is not part of the domestic law of the United Kingdom, but it constitutes a limitation upon the right preserved by art. 6 of the Chicago Convention. Section 8 of the 1949 Act must, I think, be construed in the light of this limitation. Fortunately, Mr. Lloyd accepts that the Secretary of State, in seeking to include the new condition in Pan-Am's operating permit, thought that he was acting consistently with the Bermuda Agreement and does not claim the right to act inconsistently with it.

It is therefore necessary to look closely at that agreement.<sup>3</sup>

The argument appears to have been that Section 8 of the 1949 Act, although it refers only to the Chicago Convention, must be taken to contemplate also bilateral undertakings made pursuant to the Convention in the exercise of powers recognized by it;<sup>4</sup> and that the generality of the 'terms' or 'conditions' permitted by the Convention and the Act was limited accordingly. One obvious objection was that Article 13 of the Bermuda Agreement contemplated amendment of its terms, and that on his Lordship's view either such amendment could not extend the meaning of 'rates' in the Annex, or else the apparently general power to impose conditions on permits under the Act was ambulatory in extent, depending on the bilateral conventions for the time being in force. Neither view is tenable, and in *Seaboard World Airlines Inc. v. Department of Trade* his Lordship retreated from the 'legal minefield',<sup>5</sup> referring his decision in the instant case to the concession made for the Secretary of State that he did not claim the right to act inconsistently with the Bermuda Agreement.<sup>6</sup> Neither did the concession last; the Court of Appeal were emphatic in rejecting any reference to the Bermuda Agreement in this case.

[I]n my judgment this Bermuda Agreement forms no part of the municipal law of this country. The law which we have to apply in this Court is contained in the three documents: the Civil Aviation Act, 1949; the Air Navigation Order, 1974, coupled with the

<sup>1</sup> U.K.-U.S. Agreement relating to Air Services, Bermuda, 11 February 1946: *United Kingdom Treaty Series*, No. 3 (1946) (Cmd. 6747).

<sup>2</sup> [1975] 2 Ll. L.R. at p. 401, referring to I.A.T.A. terminology and practice.

<sup>3</sup> At p. 400.

<sup>4</sup> Cf. Chicago Convention, Art. 83 ('arrangements not inconsistent with the provisions of this Convention').

<sup>5</sup> [1976] 1 Ll. L.R. 42 at p. 47.

<sup>6</sup> *Ibid.*; this *Year Book*, 47 (1974-5), p. 352 n. 6.



Chicago Convention 1944, which is to be read with it and interpreted with it. See the principles which were enunciated in *Salomon's case*, [1967] 2 Q.B. 116, by Lord Justice Diplock and myself. As I read those three documents, there is no limitation whatever on the power of the Secretary of State to impose conditions in their operating permits. Those conditions can contain conditions restricting the commissions payable to travel agents. That is the municipal law of this country.<sup>1</sup>

Scarman L.J. agreed: this case came within neither of the rules permitting reference to international conventions:

[I]nternational conventions may be looked at when Parliament expressly required it or when it is a proper inference that Parliament, even though no express words have been used, requires the Courts to do so. In such circumstances . . . it does become the duty of our Courts to look at the international convention and to interpret the law or the words of the statute under consideration in the light of the convention.

There is one other situation in which, in my opinion, it is proper for our Courts to take note of an international convention. It arises when two courses are reasonably open to the Court: but one would lead to a decision inconsistent with her Majesty's international obligations under the convention while the other would lead to a result consistent with those obligations. If statutory words have to be construed or a legal principle formulated in an area of the law where Her Majesty has accepted international obligations, our Courts—who, of course, take notice of the acts of Her Majesty done in the exercise of her sovereign power—will have regard to the convention as part of the full content or background of the law. Such a convention, especially a multilateral one, should then be considered by Courts even though no statute expressly or impliedly incorporates it into our law. See recent decisions of this Court interpreting the Immigration Act 1971 in the light of the European Convention on Human Rights 1950. . . . But that is not this case.<sup>2</sup>

*Municipal law—relation to international convention—relevance of international human rights provisions*

*Case No. 7. R. v. Chief Immigration Officer, Heathrow Airport, ex parte Salamat Bibi*, [1976] 1 W.L.R. 979; [1976] 3 All E.R. 843, C.A. In the last volume of this *Year Book*, a number of cases were considered in which the courts relied on provisions in human rights instruments—the Universal Declaration of Human Rights<sup>3</sup> and especially the European Convention on Human Rights<sup>4</sup>—in aid of the interpretation or application of statutory provisions.<sup>5</sup> To some extent these cases were merely an application of the

<sup>1</sup> [1976] 1 Ll. L.R. 257 at p. 260 *per* Lord Denning M.R. (with whom Lawton L.J. agreed); at pp. 261-2 *per* Scarman L.J.

<sup>2</sup> *Ibid.*, but cf. *Case No. 7*. Lord Denning added that in his view the term 'rates' included travel agents' commissions: at pp. 260-1. Scarman L.J. expressed no view; the appropriate forum was that provided by Art. 9 of the Bermuda Agreement: at p. 262.

Cf. also on the Bermuda Agreement, *Laker Airways Ltd. v. Department of Trade*, [1977] 2 W.L.R. 234, where the Court of Appeal, affirming Mocatta J., [1976] 3 W.L.R. 537, held that a power impliedly conferred by Art. 2 (1) (a) of the Bermuda Agreement had been itself impliedly restricted by the Civil Aviation Act, 1971, ss. 3, 4. Applying orthodox principles of statutory restraint of prerogative power (cf. *A.G. v. De Keyser's Royal Hotel*, [1920] A.C. 508), the Court of Appeal in effect enjoined the Department of Trade from performing an act in the United States in the conduct of the foreign affairs of the United Kingdom. While treaty may not limit statutory powers, statute may limit the exercise of powers conferred by treaty.

<sup>3</sup> U.N. Doc. A/811; (1949) Cmd. 7662.

<sup>4</sup> *United Kingdom Treaty Series*, No. 71 (1953) (Cmd. 8969).

<sup>5</sup> *Sc. R. v. Miah*, [1974] 1 W.L.R. 673; *R. v. Secretary of State for the Home Department, ex parte Bhajan Singh*, [1976] 1 Q.B. 198; *R. v. Secretary of State for the Home Department, ex parte Phansopkar; ex parte Begum*, [1976] 1 Q.B. 606; *Birdi v. Secretary of State for Home*

established presumption that Parliament does not intend to violate the treaty obligations of the United Kingdom;<sup>1</sup> but some of the *dicta* seemed to go rather further than that.<sup>2</sup> The extent to which this line of authority would be fully adhered to thus remained an open one.<sup>3</sup>

The applicant here was a Pakistani citizen whose husband had, under Section 1 (2) of the Immigration Act 1971, indefinite leave to remain in the United Kingdom. Section 1 (5) further provided that rules made under the Act should

be so framed that Commonwealth citizens settled in the United Kingdom at the coming into force of this Act [i.e. on 1 January 1973] and their wives and children are not, by virtue of anything in the rules, any less free to come into and go from the United Kingdom than if this Act had not been passed.

The applicant arrived at Heathrow with neither visa nor entry certificate, as required by paragraph 34 of the rules. Not being satisfied that she intended only to visit Britain, the immigration officer refused her leave to enter under paragraph 13. On an application for certiorari to quash the refusal, two points were taken. First, it was said that the rules contravened Section 1 (5) of the Act since they abridged the freedom the applicant had, in January 1973, as the wife of a Commonwealth citizen,<sup>4</sup> to enter the United Kingdom. To this the short answer was given that the rules in 1971, no less than after 1973, required a person in the applicant's position to have an entry clearance.<sup>5</sup>

Secondly, it was said that Article 8 (1) of the European Convention of Human Rights, providing for 'respect for . . . private and family life', in some way entitled the applicant to be admitted to the United Kingdom to join her husband. Such an argument could have been put in two different ways.

The European Convention might have been regarded as itself conferring on the applicant this right, although it is one thing to 'respect' family life, and quite another to entitle a person to enter another country without compliance with normal immigration requirements. Lord Denning expressed the position as follows:

Counsel for the applicant drew our attention to some declarations which have been made by the government of the United Kingdom. This country has declared, in accordance with art. 25 of the convention, that the European Commission is competent to receive petitions from persons who complain that the rights set forth in the convention have been violated. If a person has exhausted all remedies available to him in England, he can apply to the European Commission so as to get a remedy there. Counsel for the applicant submits that, in consequence of those declarations, every person is given, by art. 8, a right which the courts must recognise and enforce. I cannot accept this submission. . . .

The position, as I understand it, is that if there is any ambiguity in our statutes or uncertainty in our law, then these courts can look to the convention as an aid to clear up the ambiguity and uncertainty, seeking always to bring them into harmony with it.

*Affairs* (*The Times*, 12 February 1975). See this *Year Book*, 47 (1974-5), pp. 356-61; Dale, *International and Comparative Law Quarterly*, 25 (1976), p. 292 at pp. 305-7.

<sup>1</sup> *Supra*, p. 346 n. 1.

<sup>2</sup> e.g., *per* Lord Denning M.R. in *Birdi v. Secretary of State for Home Affairs*; cf. [1976] 1 Q.B. at p. 207.

<sup>3</sup> This *Year Book*, 47 (1974-5), at p. 361.

<sup>4</sup> Under s. 1 of the Pakistan Act 1973 the applicant's husband ceased to be a Commonwealth citizen. The rules here were made while the applicant's husband was still a Commonwealth citizen. *Quaere* whether he retained the protection of s. 1 (5) of the 1971 Act for the purposes of rules made after 1 September 1973, when the Pakistan Act came into force; or generally.

<sup>5</sup> [1976] 3 All E.R. at pp. 846-7 *per* Lord Denning M.R., with whom Roskill and Geoffrey Lane L.JJ. agreed.



Furthermore, when Parliament is enacting a statute or the Secretary of State is framing rules, the courts will assume that they had regard to the provisions of the convention and intended to make the enactment accord with the convention, and will interpret them accordingly. But I would dispute altogether that the convention is part of our law. Treaties and declarations do not become part of our law until they are made law by Parliament.<sup>1</sup>

Clearly this was not a question of interpreting an Act but of giving direct effect to an unimplemented convention.<sup>2</sup> But, more subtly, it was also argued that the discretions conferred by the Immigration Act 1971 and the rules made thereunder were to be exercised having regard to the terms of the Convention. In other words, the Convention constituted a code of 'proper purposes' by reference to which the courts could exercise their powers of review. This had been the inference, at least, to be drawn from *ex parte Bhajan Singh*, where the Court of Appeal had treated Article 8 as relevant to an exercise of discretion by the Secretary of State.<sup>3</sup> To do this is not to implement a convention without statutory authority: instead and in accordance with the presumption of consistency with international obligations, it is to employ the general standards of the Convention as the standards for the exercise of discretion which the Act intended but left unexpressed.<sup>4</sup> No doubt this would be a new and striking application of the presumption of consistency with international obligations; but it is not contrary to any fundamental principle. However, their Lordships apparently rejected any such notion. Lord Denning, for example, thought it necessary

to amend one of the statements I made in *R. v. Secretary of State for Home Affairs, ex parte Bhajan Singh*. I said then that the immigration officers ought to bear in mind the principles stated in the convention. I think that would be asking too much of the immigration officers. They cannot be expected to know or to apply the Convention. They must go simply by the immigration rules laid down by the Secretary of State and not by the convention. I may also add this. The convention is drafted in a style very different from the way which we are used to in legislation. It contains wide general statements of principle. They are apt to lead to much difficulty in application; because they give rise to much uncertainty. They are not the sort of thing which we can easily digest. Article 8 is an example. It is so wide as to be incapable of practical application. So it is much better for us to stick to our own statutes and principles and only look to the convention for guidance in case of doubt.<sup>5</sup>

Roskill L.J. was even more emphatic.

What is said is that the immigration officers should, in exercising their powers under the rules, which as I have already said are part of the law of this country, take into account the provisions of the convention, which is not. With respect I am unable to agree. In *R. v. Secretary of State for the Home Department, ex parte Phansopkar*<sup>6</sup> and again in *Pan-American World Airways Inc. v. Department of Trade*,<sup>7</sup> to which Lord Denning M.R. has referred, Scarman L.J., who was a member of the court on both occasions, as were Lord Denning M.R. and Lawton L.J., went, if I may most respectfully say so, rather

<sup>1</sup> At p. 847 *per* Lord Denning M.R.

<sup>2</sup> In any event, nothing in Art. 8 (2) entitled anyone to enter any country. All that was required was 'respect' for family life. This first argument was therefore entirely misconceived.

<sup>3</sup> [1976] 1 Q.B. at pp. 207-8 *per* Lord Denning M.R. (with whom Browne and Geoffrey Lane L.JJ. agreed).

<sup>4</sup> It might be important, on this view, that the Act was passed *after* the United Kingdom ratified the Convention in question: that was the case here.

<sup>5</sup> [1976] 3 All E.R. at pp. 847-8.

<sup>6</sup> [1976] 1 Q.B. at p. 629.

<sup>7</sup> [1976] 1 Ll. L.R. at pp. 261-2; *supra*, p. 348.



further in this connection than did the other two members of the court . . . [His Lordship cited a passage from *ex parte Phansopkar*, set out elsewhere,<sup>1</sup> and continued . . .]

With respect, that dictum was obiter. As I venture to think, it is somewhat too wide and may call for reconsideration hereafter. In his judgment to which Lord Denning M.R. has referred in the *Pan-American* case, Scarman L.J. dealt with what I might call the overall position, but then he went on to say very much the same thing as he had said in the *Phansopkar* case in the passage to which I have referred . . . There again, with great respect, I think the matter is somewhat too widely expressed. Lord Denning M.R. has already said that perhaps he too went somewhat too far in *R. v. Secretary of State for Home Affairs, ex parte Bhajan Singh*. I most respectfully agree with that view.

Accordingly, in my judgment, there are no grounds for imposing on those who have the difficult task, which immigration officers have, to perform the additional burden of considering, on every occasion, the application of the convention.<sup>2</sup>

Geoffrey Lane L.J. agreed:

Finally, it is submitted that the immigration officers had a discretion which they should have exercised in favour of the applicant and in the exercise of which they should have been guided by the provisions of art. 8 of the convention. In my judgment they had no such discretion in this case. Secondly, even if they had, there was no obligation on them to have regard to the terms of the convention. One only has to read the article in question, art. 8 (2), to realise that it would be an impossibility for any immigration officer to apply a discretion based on terms as wide and as vague as those in art. 8 (2). . . .<sup>3</sup>

Their Lordships' rejection of Article 8 (2) as impossibly vague is to be contrasted with the strong preference for a 'teleological' interpretation of European Conventions, and the apparent acceptance of provisions drafted in general terms evident for example in *Buchanan's* case.<sup>4</sup> With respect, their Lordships appear to adopt a teleological approach to matters of compensation for distillers of whisky, but a literal approach to issues of respect for human rights.

In any event the problem of standards for the exercise of discretion did not really arise here, because, as Geoffrey Lane L.J. pointed out, the immigration officer was given no discretion in this case.<sup>5</sup> Nor does the 'relevant considerations' argument require the Courts to usurp administrative functions: the remedy must always be to require the relevant authority to determine the issue in accordance with appropriate standards. The courts do not become courts of appeal from administrative decisions, and the immigration officers are still left with a broad discretion. But the acceptance of any such view was impeded both by the sweeping terms in which counsel for the applicant argued the point; and by the fairly restricted ambit of review the courts have permitted themselves in immigration matters.<sup>6</sup> It may be then that outside the area of immigration law, there is still room for the argument that human rights standards, accepted in binding terms by Her Majesty's Government (and in this case provided with their own machinery for interpretation), are relevant considerations in the judicial review of discretions conferred by subsequent statutes.<sup>7</sup> But for the time being

<sup>1</sup> *This Year Book*, 47 (1974-5), at pp. 360-1.

<sup>2</sup> [1976] 3 All E.R. at p. 849.

<sup>3</sup> At p. 850.

<sup>4</sup> *Supra*, Case No. 5.

<sup>5</sup> At p. 849.

<sup>6</sup> Cf. *Re H. K. (an Infant)*, [1967] 2 Q.B. 617. For a more recent statement, *R. v. Secretary of State for the Home Department, ex parte Mughal*, [1974] 1 Q.B. 313 at p. 325.

<sup>7</sup> Cf. *supra*, Case No. 6, where a similar argument was rejected. But there it was overwhelmingly likely that the Act intended to reflect the general discretion given by the Chicago Convention rather than any more restricted one under (subordinate) bilateral agreements.

at least, the *jurisprudence* of the Court of Appeal in matters involving the European Convention is by no means *constante*.<sup>1</sup>

*Jurisdiction—civil proceedings—counterclaim—service out of jurisdiction—whether prohibited by international law*

*Case No. 8. Derby & Co. Ltd. v. Larsson*, [1976] 1 W.L.R. 202, H.L.; [1967] 1 All E.R. 401, H.L. & C.A. A Swedish company, S-M., had commodity dealings with English brokers, Derby & Co. Ltd. Whether S-M. owed money to, or was owed money by Derby & Co. depended upon the former's relationship with Larsson, a Swedish resident who had purported to act as their agent in the dealings. S-M. sued Derby & Co., who sought to join Larsson as defendant to their counter-claim, either as personally liable or for breach of warranty of authority. Derby & Co. applied for leave to serve Larsson outside the jurisdiction. Leave having been granted,<sup>2</sup> Larsson appealed; the Court of Appeal set aside the service and subsequent proceedings, but these were reinstated by the House of Lords. For present purposes, the interest of the case lies in the fact that both Roskill L.J. and Lord Simon of Glaisdale thought that service out of the jurisdiction in cases such as this constituted 'an invasion of general principles of international law',<sup>3</sup> with the consequence that only sparingly should leave be granted.

Thus Lord Simon stated that

R.S.C., Ord. 11, r. 1 (1) (j) represents a concern to hold in balance two considerations which are liable to conflict. On the one hand there is the principle of international law that the courts of this country will not as a general rule seek to exercise jurisdiction over persons resident outside the territorial limits of their jurisdiction. On the other hand there is the desirability that, in legal proceedings in this country, all such persons should be before the court as are required for justice to be done.<sup>4</sup>

*Dicta* to this effect are not uncommon,<sup>5</sup> but the extent to which the assumption by English courts of jurisdiction over non-residents is a breach of international law is controversial. Dr. Akehurst, after surveying the diverse and extensive bases for civil jurisdiction claimed in various States, has argued that

In practice the assumption of jurisdiction by a State does not seem to be subject to any requirement that the defendant or the facts of the case need have any connection with that State; and this practice seems to have met with acquiescence by other States . . . It is hard to resist the conclusion that (apart from the well-known rules of immunity for foreign States, diplomats, international organizations, etc.) customary international law imposes no limits on the jurisdiction of municipal courts in civil trials.<sup>6</sup>

Probably the more usual view is that of Dr. Mann, who infers the need for a substantial

<sup>1</sup> *Phansopkar's Case* (*supra*, p. 348 n. 5) involved only a subsidiary application of the European Convention, and is probably still good law. (Cf. *R. v. Secretary of State for the Home Office, ex parte Akhtar*, [1976] Cr. App. R. 167.) But the reasoning in *ex parte Bhajan Singh* must now be regarded as wrong.

<sup>2</sup> Pursuant to R.S.C. Ord. 11, r. 1 (1) (j), which applies where the action is 'properly brought against a person duly served within the jurisdiction [and] a person out of the jurisdiction is a necessary or proper party thereto . . . '.

<sup>3</sup> [1976] 1 All E.R. at p. 414 *per* Lord Simon.

<sup>4</sup> *Ibid.* at p. 413 *per* Lord Simon; cf. at p. 409 *per* Roskill L.J. ('a trespass on the sovereignty of another country'). None of the other judges referred to the matter.

<sup>5</sup> e.g. *Tyne Improvement Commissioners v. Armement Anverso S.A.*, [1949] A.C. 326 at p. 357 *per* Lord Normand.

<sup>6</sup> *This Year Book*, 46 (1972-3), pp. 170-7 at p. 177.



connection with the State asserting jurisdiction.<sup>1</sup> Even on this view it is doubtful that an assertion of jurisdiction over a defendant in Larsson's position would be improper, since Larsson had engaged directly with Derby & Co. in procuring transactions in England governed by English law.<sup>2</sup> If international law is to be used as a guide by the courts in determining the propriety of service out of the jurisdiction, it seems clear that a rather more refined view of the international legal position is required than is provided by the *dicta* here.

*Sovereign immunity—action in personam—central bank—whether instrumentality of foreign State—acts jure gestionis—immunity denied; doctrine of incorporation—international law and stare decisis*

Case No. 9. *Trendtex Trading Corporation v. Central Bank of Nigeria*, [1977] 2 W.L.R. 356, [1977] 1 All E.R. 881, C.A.; reversing [1976] 3 All E.R. 437, [1976] 1 W.L.R. 868, Donaldson J. In *The Philippine Admiral*, the Judicial Committee of the Privy Council stated that

The rule that no action in personam can be brought against a foreign sovereign state on a commercial contract has been regularly accepted by the Court of Appeal in England and was assumed to be the law even by Lord Maugham in *The Cristina* [1938] A.C. 485. It is no doubt open to the House of Lords to decide otherwise but it may fairly be said to be at the least unlikely that it would do so.<sup>3</sup>

Their Lordships' prediction has been tested, with some promptitude, in the Court of Appeal and found (by a majority) to be wanting; since leave to appeal has been granted, its accuracy so far as the House of Lords itself is concerned remains to be seen. But whatever its ultimate fate the decision of the Court of Appeal is of the greatest interest, not merely for the law of sovereign immunity but for much more general questions of the relationship between English law and customary international law.

The defendant, the Central Bank of Nigeria, was incorporated by Act of the Nigerian Parliament. It was not declared to be a department of State; but it acted as the reserve bank for Nigeria, and conducted the accounts of the federal and state governments and other governmental institutions. It was empowered to conduct accounts for other persons in Nigeria with the consent of the central government, but it did not in fact do so. The Bank was wholly owned by the central government, which appointed its officers and retained a considerable degree of control over the conduct of its affairs.<sup>4</sup>

In April 1975 the Nigerian Ministry of Defence contracted with an English firm for the delivery of 240,000 tons of cement. The defendant Bank accordingly opened with their London agents, Midland Bank Ltd., an irrevocable letter of credit in favour of the English firm. In July 1975 the letter of credit was transferred to the plaintiff, a Swiss firm, which undertook to supply the cement. In fact the Nigerian authorities

<sup>1</sup> In *Studies in International Law* (1973), pp. 1-139 at pp. 34-41. Cf. Brownlie, *Principles of Public International Law* (2nd edn., 1973), pp. 291-2, 302-3.

<sup>2</sup> The various conventions for recognition and enforcement of foreign civil judgments include among judgments entitled to recognition cases based on a counterclaim such as this. See e.g. Draft Hague Convention on the Recognition and Enforcement of Foreign Judgments, 1966, Art. 11 (2), *International Legal Materials*, 5 (1966), p. 637; E.E.C., Convention concernant la compétence judiciaire à l'exécution des décisions en matière civile et commerciale, 1968, Art. 6: *Journal officiel des Communautés européennes*, 1972, No. L 299/32.

<sup>3</sup> [1976] 2 W.L.R. 214 at pp. 232-3; this *Year Book*, 47 (1974-5), pp. 365-9.

<sup>4</sup> See the full description by Donaldson J., [1976] 1 W.L.R. at pp. 874-6. The defendant bank was modelled on the Bank of England, as to which see *Halsbury's Laws of England* (4th edn., 1973), vol. 3, pp. 2-3.



had ordered far more cement than could be handled in their ports; and, after a change of government, the defendant was directed to stop demurrage payments on all consignments, and payments for further shipments of concrete unless due notice had been given and clearance to sail obtained. The plaintiff sought to recover on the letter of credit the amount due for two shipments, and demurrage. To this claim the defendant pleaded sovereign immunity.

It is useful to deal with the various issues separately.

(1) *The Central Bank of Nigeria as an agency of government.* English courts have distinguished, for the purposes of sovereign immunity, between agents of a government, who are not immune, and its agencies, entitled to immunity.<sup>1</sup> It was argued for the Bank that it constituted, despite its corporate identity, a department or 'arm' of the Nigerian Government, and was thus entitled to immunity. Such questions have sometimes been regarded as determined in practice by the evidence or affidavit of the ambassador of the State claiming immunity; but Donaldson J., rightly, it is submitted, rejected that view.<sup>2</sup> Instead the question was whether the entity was to be regarded as in substance a department of State, having regard to the terms of the foreign law establishing it and to its functions.<sup>2</sup> His Lordship concluded that 'looking at the matter as a whole, the Central Bank of Nigeria is an emanation, an arm, an alter ego and a department of the State of Nigeria'.<sup>3</sup> On appeal this view was rejected by all three members of the court. Stephenson and Shaw L.JJ. both emphasized the undesirability of extending immunity too far; and both relied on something like a presumption against the governmental status of an entity separately incorporated and not expressly declared to be a department of State.<sup>4</sup> Thus Stephenson L.J. agreed that 'English courts should be extremely careful not to extend sovereign immunity to bodies which are not clearly entitled to it',<sup>5</sup> and regarded 'the absence in a 1958 enactment of any clear expression of intent to confer the status of a government department on the bank as a pointer towards the opposite intention'.<sup>6</sup>

In the absence of such an express statement of intent, and despite the more-or-less<sup>7</sup> exclusively governmental functions of the bank and its extensive subjection to central control, their Lordships agreed that the Bank had not established an entitlement to immunity.<sup>8</sup> Lord Denning, however, regarded this question as so troublesome that he preferred to rest on the ground of restrictive immunity;<sup>9</sup> on the other hand, this was Stephenson L.J.'s *ratio decidendi*, since he felt compelled to dissent on the restrictive immunity issue. Only Shaw L.J. relied with equal firmness on both arguments.

The decision, denying the status as a department of State of a reserve bank wholly owned by and substantially under the direction of a foreign government, is in striking contrast to the view taken of entities such as the Tass Agency<sup>10</sup> or the Servicio Nacional

<sup>1</sup> For discussion see O'Connell, *International Law* (2nd edn., 1971), vol. 2, pp. 872-7.

<sup>2</sup> [1976] 1 W.L.R. at p. 873.

<sup>3</sup> At p. 877.

<sup>4</sup> But O'Connell (*International Law* (2nd edn., 1971), vol. 1, p. 873) denies any such presumption.

<sup>5</sup> [1977] 2 W.L.R. at p. 375.

<sup>6</sup> Ibid. Cf. Shaw L.J. at p. 384 (but conceding that this is not a 'rule of law').

<sup>7</sup> Shaw L.J. (at p. 383) relied on the Bank's function as adviser to the Federal Government as evidence of its independent status. *Contra* Donaldson J., [1976] 1 W.L.R. at p. 876.

<sup>8</sup> [1977] 2 W.L.R. at p. 371 *per* Lord Denning M.R.; at pp. 375-6 *per* Stephenson L.J.; at pp. 383-5 *per* Shaw L.J.

<sup>9</sup> At p. 371.

<sup>10</sup> *Krajina v. Tass Agency*, [1949] 2 All E.R. 274; this *Year Book*, 26 (1949), pp. 466-7.

del Trigo<sup>1</sup> in English courts. The extension of immunity to the latter in respect of contracts for the purchase of rye must probably be regarded as the high water mark of the extension of immunity to separate corporate entities<sup>2</sup> (although the status of any particular entity is a question of fact rather than law).<sup>3</sup>

In particular, the emphasis here was overwhelmingly on the formal factors—incorporation and the absence of any express declaration of status—rather than material factors such as governmental ownership and control or the ambit of the bank's activities in practice. On the other hand it is true that banks have not generally, in immunity cases<sup>4</sup> or otherwise,<sup>5</sup> been treated as departments or organs of State; though many of the cases concerned trading rather than reserve banks.<sup>6</sup>

(2) *The extent of sovereign immunity in international law.*<sup>7</sup> This case demonstrates clearly that the difficulty of distinguishing 'governmental' from 'trading' activities is not necessarily avoided, and may indeed be compounded, by a rule of absolute immunity, since the courts in determining the status of a corporate entity may have to characterize not merely the particular transaction but the range of transactions in which that entity happens to engage.<sup>8</sup> A further criticism of absolute immunity is that it enables foreign governments, in a period of greatly increased State trading, to attract immunity to trading activities by making suitable declarations in the instruments establishing the entities in question.<sup>9</sup> It may be that a government should not, merely because it has incorporated one of its departments or organs, lose an immunity to which it would otherwise be entitled;<sup>10</sup> but the reverse process is perhaps as undesirable.

<sup>1</sup> *Baccus S.R.L. v. Servicio Nacional del Trigo*, [1957] 1 Q.B. 438; this *Year Book*, 33 (1957), pp. 323-4.

<sup>2</sup> Cf. Wedderburn, *International and Comparative Law Quarterly*, 6 (1957), pp. 290-300 at p. 290.

<sup>3</sup> The ratio of *Krajina v. Tass Agency* was simply that the defendant had not been shown to be a separate corporate entity. Singleton L.J. expressly reserved the status of the Tass Agency in the event that further evidence of the foreign law became available: [1949] 2 All E.R. at p. 285.

<sup>4</sup> *Swiss Israel Trade Bank v. Government de Salta and Banco Provincial de Salta*, [1972] 1 Ll. L.R. 497 at p. 507; this *Year Book*, 46 (1972-3), pp. 427-8; *Ulen & Co. v. Bank Gospodarstwa Krajowego*, 24 N.Y.S. 2d. 201 (1940); *Mirabella v. Banco Industrial de la Republica Argentina*, 237 N.Y.S. 2d. 499 (1963). But cf. *Dunlap v. Banco Central del Ecuador*, 41 N.Y.S. 2d. 660 (interlocutory proceedings only).

<sup>5</sup> But cf. *Bank of New South Wales v. Commonwealth*, (1948) 76 C.L.R. 1 (on distinct grounds).

<sup>6</sup> The constitutions of thirty-eight central banks are usefully set out in Aufricht, *Central Banking Legislation* (Washington, 2 vols., 1961, 1967). In no case was there an express declaration of departmental status. The nearest approach was El Salvador (Decree of 1961, Art. 1, '... an entity of the State, of public character ... with its own juridical personality ...': *ibid.*, vol. 1, p. 748). A common formula was 'adviser, fiscal agent and banker' for the State. In one case (Costa Rica, Arts. 2, 118: *ibid.*, vol. 1, pp. 583, 614), that formula was combined with an express declaration of independence. Some Acts contain express provisions submitting the bank in question to the jurisdiction of the (local) courts (e.g., France, Art. 97: *ibid.*, vol. 2, p. 186). There is no case of express exclusion of such jurisdiction. For Aufricht's own review see his *Comparative Survey of Central Bank Law* (1965), ch. 9.

<sup>7</sup> See generally Brownlie, *Principles of Public International Law* (2nd edn., 1973), pp. 319-27; O'Connell, *op. cit.* (above, p. 354 n. 1), vol. 2, pp. 844-59; Sucharitkul, *State Immunities and Trading Activities in International Law* (1959), and works there cited.

<sup>8</sup> A point made by the Board in *The Philippine Admiral*, [1976] 2 W.L.R. 214 at p. 232.

<sup>9</sup> In the *Thai-Europe Tapioca* case, [1975] 1 W.L.R. 1485, the original contract was made with the West Pakistan Agricultural Development Corporation. Before the writ was served the Corporation was dissolved, and was succeeded by a branch of the Ministry of Food and Agriculture. Immunity was granted. See this *Year Book*, 47 (1974-5), p. 362.

<sup>10</sup> Cf. [1977] 2 W.L.R. at p. 370 *per* Lord Denning M.R.



However, any such argument depends ultimately upon the proposition that international law entitles foreign governments to immunity from suit only for certain ('governmental') transactions. In view of the authorities that question had not been canvassed by Donaldson J.,<sup>1</sup> but it was fully discussed by all three members of the Court of Appeal, after thorough argument and citation of authority.<sup>2</sup> Lord Denning has of course been committed to the restrictive theory since his speech in *Rahimtoola v. Nizam of Hyderabad*;<sup>3</sup> but their Lordships were in general agreement on this point. Stephenson L.J. expressed the argument most clearly:

I would find less difficulty in accepting restrictive immunity in place of absolute immunity if restrictive immunity were as generally accepted today as absolute immunity was in the past—and that may not have been as universally accepted as I have assumed. But rules of international law, whether they be part of our law or a source of our law, must be in some sense 'proved', and they are not proved in English courts by expert evidence like foreign law: they are 'proved' by taking judicial notice of 'international treaties and conventions, authoritative text books, practice and judicial decisions' of other courts in other countries which show that they have 'attained the position of general acceptance by civilised nations': *The Cristina* [1938] A.C. 485, 497, *per* Lord MacMillan: and those sources come seldom if ever from every civilised nation or agree upon a universal rule; they move from one generally accepted rule towards another. But if none moved, old rules would never die and new rules never come into being. Some move must be made by states, or their tribunals, or jurists, to prevent petrification of the living law. When should a court of law accept or adopt or incorporate or assent to what is alleged to be a new rule of international conduct? Can an English court ever make the first move in this country? Or must it wait for a 'Tate letter' from the Government of the United Kingdom? or for an Act of Parliament? If one asks the questions indicated by the judgment in *West Rand Central Gold Mining Co. Ltd. v. The King* [1905] 2 K.B. 391 the answers do not give Trendtex much help. Have civilised states agreed that the doctrine of restrictive immunity shall be binding upon them in their dealings with one another? The answer is doubtful; many have. Is there evidence that Great Britain has ever assented to the doctrine? The answer must be no—until she ratifies the European Convention on State Immunity which she signed at Basle on May 16, 1972, and perhaps also the Brussels Convention of 1926. Has it been proved by satisfactory evidence that the doctrine has been recognised and acted upon by our own country? No. Or that it is of such a nature, and has been so widely and generally accepted, that it can hardly be supposed that any civilised state would repudiate it? The answer to that might be yes; the Government of Nigeria has not repudiated the doctrine by instructing the bank to plead immunity for what it alleges to be an act done *jure imperii*, but it is a bold claim that no civilised state would repudiate the application of the restrictive doctrine to actions in personam, and inconsistent with the opinion of the Privy Council to which Lord Denning M. R. has referred, that the House of Lords is unlikely to apply it to them. Have the opinions of jurists received the express sanction of international agreement, or have they grown to be part of international law by their frequent practical recognition in dealings between various nations? On all the material put before us I could not answer that question in the affirmative. It is clearly difficult if not impossible to prove that governments have acted on the 'rule' of restrictive immunity by failing to plead immunity for ordinary commercial transactions. How do you prove that the gestation of a new rule is over and that it has come to birth? Or that an old rule has grown and developed into a new form?

<sup>1</sup> [1976] 1 W.L.R. at p. 872.

<sup>2</sup> Their Lordships referred, *inter alia*, to Lauterpacht, this *Year Book*, 28 (1951), pp. 220-72; *Alfred Dunhill of London Inc. v. Republic of Cuba*, 48 L. ed. 2d. 301 (1976); Foreign Sovereign Immunities Act, 1976 (U.S.), *International Legal Materials*, 15 (1976), p. 1398; and to the 1972 European Convention on State Immunity, *ibid.*, 11 (1972), p. 470.

<sup>3</sup> [1958] A.C. 379, at pp. 415-24.



It is part of Mr. Bingham's case that a vacuum may have been created in the law of nations by the dissent of many from the old rule, but that the vacuum has not been filled by any agreed new rule. Even if the law of nations does not abhor a vacuum, it is entirely unsatisfactory that the courts of this country should not lift a finger to help fill it by a new rule which is 'consonant with justice'. In my judgment this new rule is consonant with justice. It is in accord with the law merchant which requires that payments on letters of credit should be honoured. It is now so widely and generally accepted that no civilised country which has not yet expressly assented to it should be presumed to repudiate it. It would be repugnant to justice if an English court were to repudiate it in modern conditions and so in effect extend the old rule of immunity to transactions which were never considered subject to it by former judges and jurists because such transactions would never in their time have been carried out by sovereign states or their emanations.<sup>1</sup>

This passage exemplifies, as it expresses, the creative role of the judge, including the municipal judge, in the process by which rules of international law come to be established.<sup>2</sup> Where there is no unanimity on an issue then considerations of justice and equity may be resorted to, at least where the area in question has always been regulated by rules which are now subject to change. The judgments also indicate a rejection of the excessively positivist formulae for proving customary rules, expressed for example by Lord Alverstone,<sup>3</sup> or by the Permanent Court in *The Lotus*.<sup>4</sup> That this was done in the face of the United Kingdom's failure to ratify the various conventions embodying the restrictive rule makes the unanimity the more remarkable, though there may be no guarantee that this general attitude to the formation of customary rules will be carried over into other areas of the law. *Thakrar's* case provides a clear illustration of a more intransigent judicial attitude to a rule certainly not less well established than that of restrictive immunity.<sup>5</sup>

(3) *The doctrine of incorporation: international law in British courts.* Given then, that international law does not require the extension of immunity to transactions *jure gestionis*, the question for the court was whether this view could be acted on. The dispute between the so called doctrines of 'incorporation' and 'transformation' was thus raised;<sup>6</sup> although it is important in any analysis of the conflict between those positions to attend to the consequences sought to be drawn from one or the other of them. Stated shortly, the 'doctrine of incorporation' is represented by statements affirming that rules of customary international law are, as it were automatically, 'part of the law of England'.<sup>7</sup> Statements of the 'doctrine of transformation' on the other hand emphasize the difficulty of proving 'the assent of the nations who are to be bound',<sup>8</sup>

<sup>1</sup> [1977] 2 W.L.R. at pp. 379-80.

<sup>2</sup> On this problem see especially Falk, *The Role of Domestic Courts in the International Legal Order* (1964).

<sup>3</sup> *West Rand Central Gold Mining Co. Ltd. v. R.*, [1905] 2 K.B. 391 at pp. 406-8, cited by Stephenson L.J. at pp. 378-9.

<sup>4</sup> *P.C.I.J.*, Series A, No. 9 (1927), at p. 18.

<sup>5</sup> [1974] 1 Q.B. 684; this *Year Book*, 47 (1974-5), pp. 352-6. The rule there was the duty of a State to receive nationals expelled from another country and with no other country willing to receive them.

<sup>6</sup> See Brownlie, *Principles of Public International Law* (2nd edn., 1973), pp. 45-9; O'Connell, *International Law* (2nd edn., 1971), vol. 1, pp. 49-50. For an earlier discussion, Picciotto, *The Relation of International Law to the Law of England* (1915), ch. 5.

<sup>7</sup> *Triquet v. Bath*, (1764) 3 Burr. 1478 per Lord Mansfield C.J. referring to *dicta* of Lord Talbot L.C. in *Barbuit's* case, (1736) 3 Burr. 1481; (1737) Forr. 280; and the cases cited by Brownlie, *op. cit.* (previous note), p. 45 n. 3.

<sup>8</sup> *R. v. Keyn*, (1876) 2 Ex. D. 63 per Cockburn C.J. at pp. 202-3.

and require some overt act of adoption or acceptance of disputed rules by the domestic system.<sup>1</sup> It is clear that the latter view was strongly influenced by the notion—predominant in the half-century or so before 1920—that rules of customary international law derived their binding force exclusively from the tacit or express consent of the States affected, rather like an unwritten multilateral convention.<sup>2</sup> However the courts have never required express incorporation or adoption of customary (as distinct from conventional) rules by statute; nor that the United Kingdom should have expressly accepted the rule in question.<sup>3</sup> The vice in the proposition that a clearly established rule of international law is not part of the law of England unless adopted as such *by the courts* is that no criteria are provided by which the courts are to decide whether or not to adopt a particular rule; and it cannot be the case that the courts apply the rule as law just because they have adopted it. Probably the *dicta* which have been regarded as embodying the ‘doctrine of transformation’ have been attempting to convey two distinct propositions, both qualifying rather than displacing the basic principle that international law is part of the law of England.<sup>4</sup> First, attention is drawn to the need for clear and satisfactory evidence that the customary rule is as contended for, and that it has according to its terms legal effects as part of the municipal law.<sup>5</sup> Secondly, emphasis is placed on the status of any such rule, once incorporated, as a distinct and independent rule of English law, subject to the normal rules of *stare decisis*.<sup>6</sup> If the ‘doctrine of transformation’ reduces itself to these two propositions, then the decision of the Court of Appeal in the present case has cast considerable doubt on both. Both Lord Denning M.R. and Shaw L.J. expressly accepted the ‘doctrine of incorporation’ as classically formulated by Lord Talbot L.C.<sup>7</sup> Lord Denning stated his present<sup>8</sup> belief

that the doctrine of incorporation is correct. Otherwise I do not see that our courts could ever recognise a change in the rules of international law. It is certain that international law does change. I would use of international law the words which Galileo used of the earth: ‘But it does move’. International law does change; and the courts have applied the changes without the aid of any Act of Parliament. Thus, when the rules of international law were changed (by the force of public opinion) so as to condemn slavery, the English courts were justified in applying the modern rules of international law . . . Seeing that the rules of international law have changed—and do change—and that the courts have given effect to the changes without any Act of Parliament, it follows to

<sup>1</sup> *Chung Chi Cheung v. R.*, [1939] A.C. 160 *per* Lord Atkin at pp. 167–8; *The Cristina*, [1939] A.C. 485 *per* Lord Wright at p. 502.

<sup>2</sup> See Brierly, *The Basis of Obligation in International Law* (ed. Lauterpacht and Waldock, 1958), pp. 1–67 for an account and critique of this position.

<sup>3</sup> But in *West Rand Central Gold Mining Co. Ltd. v. R.*, [1905] 2 K.B. 391 at p. 406, Lord Alverstone C.J. asserted that ‘whatever has received the common consent of civilized nations must have received the assent of our country’; apparently he regarded the latter as flowing from the former.

<sup>4</sup> Cf. Brownlie, *op. cit.* (above, p. 357 n. 6), p. 46 n. 2; referred to by Stephenson L.J., [1977] 2 W.L.R. at p. 379.

<sup>5</sup> This was the real point in *Thakrar’s* case (*supra*, p. 357 n. 5). There the rule did not confer rights on the individual expellee, so that its incorporation could not have assisted the plaintiff: see [1974] 1 Q.B. 684 at pp. 708–9 *per* Orr L.J.

<sup>6</sup> *Chung Chi Cheung v. R.*, [1939] A.C. 160 at p. 169; cited in *Thai-Europe Tapioca Service Ltd. v. Government of Pakistan*, [1975] 1 W.L.R. 1485 *per* Scarman L.J. at p. 1495; *per* Lawton L.J. at p. 1493.

<sup>7</sup> *Supra*, p. 357 n. 7.

<sup>8</sup> He acknowledged the contrary view expressed by him in *Thakrar’s* case, [1974] 1 Q.B. 684 at p. 701.



my mind inexorably that the rules of international law, as existing from time to time, do form part of our English law.<sup>1</sup>

Stephenson L.J., more cautiously, pointed out that 'the differences between the two schools of thought are more apparent than real',<sup>2</sup> but agreed that:

There is, however, ample authority not for the view that each nation can decide what rule suggested by any jurist or body of jurists, or laid down and applied by any foreign court or courts, it can and should itself apply, but for the view that it can and should apply a generally accepted rule.<sup>3</sup>

Their Lordships agreed, as we have seen, that the restrictive immunity principle was established here, despite continuing uncertainties and disagreements in State practice. The decision thus constitutes a distinct rejection of the reserved and sceptical attitude towards proof of international rules which was the first aspect of the 'doctrine of transformation'. At the same time it demonstrates that in the process of determining whether a particular rule is a rule of international law there is ample room for judicial flexibility. Its formal incoherence apart, the notion of an external 'adoption' or 'transformation' of accepted rules is thus seen to be unnecessary.

(4) *Rules of international law and stare decisis.* The status of the second aspect of the 'doctrine of transformation' was raised in just as acute a form. If international rules once adopted become rules of English law not dependent for their continuing validity on their international law origins, then they will be subject to normal rules of precedent. This has always been the accepted view,<sup>4</sup> although it has not escaped criticism.<sup>5</sup> But if the rule in question is regarded as continuing to form part of the *corpus* of international law rules and as deriving its validity for municipal purposes from its status as such (independent in principle of any judicial 'adoption'), then a change in the international law rule might well be reflected by the courts, whatever municipal decisions on the previous rule might have said. Otherwise the courts' capacity to 'incorporate' international law as part of the law of the land could depend on the date at which a particular international rule was first adjudicated upon—a circumstance which must often be quite arbitrary. In this case the absolute immunity rule in actions *in personam* had been frequently affirmed in the Court of Appeal;<sup>6</sup> these decisions, on the orthodox view,<sup>7</sup> must have been unchallengeable except in the House of Lords. But both Lord Denning M.R. and Shaw L.J. firmly rejected the application of *stare decisis* to those international law rules which are part of the common law. Shaw L.J. stated that:

If it were correct that once a rule of international law has been duly recognised and properly applied by an English court it is thereafter an integral and permanent part of English law then no court could afterwards change it. Perhaps not even the House of Lords, on the assumption that the original application of the principle was right and in any case not until an appeal was carried there; and this would remain the position whatever alterations of the international rule might come about. The principle originally applied might not be amenable to review or revision save by the legislature. The rule

<sup>1</sup> [1977] 2 W.L.R. at p. 365.

<sup>2</sup> At p. 379.

<sup>3</sup> At pp. 377-8.

<sup>4</sup> Cf. O'Connell, *op. cit.* (above, p. 354 n. 1), vol. 1, pp. 50-1.

<sup>5</sup> Fawcett, *The British Commonwealth in International Law* (1963), p. 39; Morgenstern, this *Year Book*, 27 (1950), pp. 80-2; cited by Brownlie, *op. cit.* (above, p. 355 n. 7), p. 45 n. 5.

<sup>6</sup> e.g., *Compañía Mercantil Argentina v. United States Shipping Board*, (1924) 131 L.T. 388; *Thai-Europe Tapioca Service Ltd. v. Government of Pakistan*, [1975] 1 W.L.R. 1485.

<sup>7</sup> *Young v. Bristol Aeroplane Co.*, [1944] K.B. 718; Cross, *Precedent in English Law* (2nd edn., 1968), pp. 108-10.



enshrined in *The Parlement Belge*, 5 P.D. 197 might survive inviolable in English jurisprudence even if discarded and discredited everywhere else in the world, unless and until Parliament intervened. The strange result would follow that eventually current international law would have to be introduced into English law by statute unless the opportunity to apply it became available to the House of Lords.

This *reductio ad absurdum* carries the suggestion that there must be a flaw in the argument which leads to the incidence of *stare decisis*. May it not be that the true principle as to the application of international law is that the English courts must at any given time discover what the prevailing international rule is and apply that rule? This is not the same process as applying foreign law in our courts for that only comes into question when for a particular reason the proper law relating to the matter before the court is that foreign law. In the case of international law it is always part of the law to be applied irrespective of any intention or agreement of the parties in suit. This, so it seems to me, is the true distinction and not that the one is immutable as a rule of law while the other is always subject to investigation as a question of fact.

What is immutable is the principle of English law that the law of nations (not what was the law of nations) must be applied in the courts of England. The rule of *stare decisis* operates to preclude a court from overriding a decision which binds it in regard to a particular rule of (international) law, it does not prevent a court from applying a rule which did not exist when the earlier decision was made if the new rule has had the effect in international law of extinguishing the old rule. . .

Lawton L. J. expressed concern as to the possible prejudice which might result to those engaged in international trade if changes in international law brought about *ipso facto* corresponding change in the law of England. But even the law of England changes quite apart from what may be happening to international law. Moreover, changes in rules of international law do not come about abruptly; and changes will not be recognised in an English court without convincing support. Those engaged in world commerce will not be insensible to the incidence of such changes over the years. Lastly there must be a greater risk of confusion if precepts discarded outside England by a majority (or perhaps all) of civilised states are preserved as effective in the English courts in a sort of judicial aspic. I would adopt what Lord Denning M. R. said, namely that 'international law knows no rule of *stare decisis*'. I would add that this remains the case even when a particular aspect of international law is being looked at as part of the law of England.<sup>1</sup>

On this view, expressly adopted here for the first time in an English court, precedent plays no role other than to guarantee the basic 'doctrine of incorporation' itself; and to make authoritative a decision as to what at that particular time the international rule is. No doubt, in the face of such a decision, the presumption must be that no change in the rule has occurred. But that it is a presumption rather than a rule would seem to be consonant with the majority's emphasis on international law as such being part of the law of England. On this point, however, Stephenson L.J.'s more reserved attitude to the status of international law in British courts led him to dissent. As his Lordship pointed out, in the *Thai-Europe Tapioca* case:

Lawton and Scarman L.JJ. each rejected that [*sc.* the restrictive immunity] argument on the ground that the doctrine of *stare decisis* applied to a rule of international law and the rule of absolute immunity had been incorporated into our municipal law by decisions binding on this court (pp. 1493, 1495). Even if their reasoning or conclusion were wrong—and they seem to follow the opinions of all three members of this court in *Reg. v. Secretary of State for the Home Department, ex parte Thakrar* [1974] Q.B. 684—they clearly decided, by no means *per incuriam*, that it was not open to them to accept the rule of restrictive immunity, and the ratio of that decision of theirs was that this court is

<sup>1</sup> [1977] 2 W.L.R. at pp. 387-9, referring to the judgment of Lord Denning M.R. at p. 365.

bound by previous decisions as to what international law is to hold that it is the same until altered by the House of Lords or the legislature; and that this court is bound by previous decisions to hold that absolute sovereign immunity is a rule of international law until the House of Lords or the legislature declares that it is so no longer.

Neither has done so. The Judicial Committee of the Privy Council has in *The Philippine Admiral* [1976] 2 W.L.R. 214 cleared the way forward by restricting the immunity for actions in rem, but has discouraged any advance towards restricting the immunity for actions in personam. The recent American and German decisions already cited may encourage the legislature or the executive or the House of Lords to recognise and adopt the new development of the old doctrine. But meanwhile I must stand loyally but reluctantly on the old doctrine and the old decisions.<sup>1</sup>

The absolute theory of immunity has not been expressly affirmed in the House of Lords; so that in any appeal a decision between these conflicting views may be unnecessary. None the less, some guidance as to the correct view is clearly desirable: for the reasons given it is submitted with respect that the majority view is to be preferred.

(5) *Other issues.* Several issues may be noted more briefly. Their Lordships agreed in characterizing the present transaction as commercial rather than governmental, and thus not protected by the restrictive immunity rule. Stephenson L.J., for example, had no doubt

that the issue of this letter of credit in payment for this cement fell on the private and commercial side of the line and was an ordinary trading transaction. It was a separate transaction from the sale to the English company in whose favour the first letter of credit was issued by the bank.<sup>2</sup>

That the cement itself was required for military purposes, even if a permissible consideration, did not affect the matter:

the intrinsic nature of a transaction rather than its object [is] the material consideration in determining whether entering into that transaction is a commercial activity or an exercise of sovereign authority.<sup>3</sup>

Clearly, then, a restrictive interpretation of the ambit of the principle of restrictive immunity is to be expected in British courts, if the principle survives on appeal: the same attitude is apparently adopted in other jurisdictions.<sup>4</sup>

Finally, their Lordships agreed in continuing an injunction precluding the defendant Bank from withdrawing from the jurisdiction funds held in the Midland Bank sufficient to satisfy any judgment. This was despite evidence that the money was the property of the Nigerian Government and constituted part of the Nigerian external reserves. It does not necessarily follow from the restrictive immunity principle that the courts should take enforcement action against the property of a foreign sovereign within the jurisdiction.<sup>5</sup> No such action can be taken against the Crown. If the funds here were in fact the property of the government (as distinct from the Bank) then sustaining the

<sup>1</sup> At p. 381.

<sup>2</sup> At p. 376; cf. Lord Denning M.R. at p. 369; Shaw L.J. at p. 389.

<sup>3</sup> At p. 389 *per* Shaw L.J.; cf. Stephenson L.J. at p. 376.

<sup>4</sup> Stephenson L.J. referred with approval to the U.S. Foreign Sovereign Immunity Act, 1976, s. 1603 (d); *ibid.* The same view in its application to a similar situation was taken by the Commercial Court of Frankfurt: cited by Lord Denning M.R. at p. 369.

<sup>5</sup> Apart of course from an action *in rem* against specific property.

injunction must have been inconsistent with the decision in the *Dollfus Mieg* case<sup>1</sup> (where the foreign sovereign's interest was merely a bailor's right to possession).<sup>2</sup> The better view is surely that of Stephenson L.J. (who felt considerable difficulty on this point): the evidence must be taken to have demonstrated only ownership by the defendant Bank.<sup>3</sup> It is on this point that their Lordships' decision may perhaps be most vulnerable.

JAMES CRAWFORD

## B. PRIVATE INTERNATIONAL LAW\*

### *Domicil*

*Case No. 1.* Two related criticisms to which the English law of domicil has been open for a long time are that the determination of a person's domicil in a given case is sometimes difficult to the point of seeming little more than purest conjecture, and that the requirements for the acquisition of a domicil of choice are too stringent. House of Lords cases such as *Winans v. Attorney-General*<sup>4</sup> and *Ramsay v. Liverpool Royal Infirmary*<sup>5</sup> stand as impressive monuments to the validity of these criticisms. However, in recent years some slight tendency has manifested itself amongst judges, particularly at first instance,<sup>6</sup> to temper the requirements for the acquisition of a domicil of choice and thus to move towards restoring the equation of domicil with the always more rational, and often more readily identifiable, notion of a person's home. Representative of this trend was the decision at first instance of Brightman J. in *Inland Revenue Commissioners v. Bullock*.<sup>7</sup> His Lordship's decision has however now been reversed by a unanimous Court of Appeal.<sup>8</sup> Buckley L.J. delivered the leading judgment with which Roskill and Goff L.JJ. concurred, the latter in exceptionally emphatic terms.

Group Captain Bullock's domicil of origin was in the Canadian Province of Nova Scotia, where he was born in 1910. In 1932 he came to England to join the Royal Air Force. In 1946 when still serving in the Royal Air Force he married an Englishwoman. Between 1947 and 1961 he made several visits to his family in Canada. He retired from the Air Force in 1959 and from 1959 until 1961 he was in civilian employment in England. In 1961, following an inheritance from his father who had died in Canada in the previous year, Bullock was able to retire to Dorset where he lived with his wife in a bungalow owned by her. In 1966 he executed a will which had been prepared in Nova Scotia. That will contained a declaration to the effect that he continued to have a domicil in Nova Scotia 'to which province I intend to return and remain permanently upon my wife's death'. He made no English will and his assets were centred in Canada. He remained a Canadian citizen and he carried a Canadian passport. There was further miscellaneous but not insignificant evidence that Bullock clearly saw himself as a Canadian. For some years he had entertained a marked prefer-

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<sup>1</sup> [1952] 1 All E.R. 572 (H.L.); this *Year Book*, 29 (1952), pp. 458-60. Cf. also *Juan Ysmael & Co. Inc. v. Government of the Republic of Indonesia*, [1955] A.C. 72 at p. 89.

<sup>2</sup> This had been the view taken by Donaldson J.: [1976] 1 W.L.R. at p. 877.

<sup>3</sup> [1977] 2 W.L.R. at p. 382; cf. Lord Denning M.R. at p. 371; Shaw L.J. at p. 389.

<sup>4</sup> [1904] A.C. 287.

<sup>5</sup> [1930] A.C. 588.

<sup>6</sup> See, e.g., *Re Flynn*, [1968] 1 W.L.R. 103, and on the quantum of proof involved *In the Estate of Fuld* (No. 3), [1968] P. 675.

<sup>7</sup> [1975] 1 W.L.R. 1436.

<sup>8</sup> [1976] 1 W.L.R. 1178.



ence to return to live permanently in Nova Scotia, but the stumbling block was that his wife did not wish to do so. He had deferred to her wishes and seemingly intended to continue doing so. It was, however, clear that his intention was to return to Nova Scotia should his wife ever change her mind or should she predecease him.

The issue was as to whether Bullock had acquired a domicile of choice in England in the tax years 1971-2 and 1972-3. Brightman J., reversing the Commissioners, gave an affirmative answer to this question. The Court of Appeal allowed Bullock's appeal, finding that he had never lost his domicile in Nova Scotia.

Buckley L.J.'s judgment is in the traditional mould. 'As long ago as 1865 Turner L.J. said in *Jopp v. Wood*, (1865) De G.J. and Sm. 616, 621, that nothing was better settled with reference to the law of domicile than that the domicile can be changed only *animo et facto*; that is to say by intention as well as action.'<sup>1</sup> 'The intention which must be sought is an intention on the part of the person concerned to make the new country his permanent home.'<sup>2</sup> 'The present intention of making a place a person's permanent home can exist only where he has no other idea than to continue there, without looking forward to any event, certain or uncertain, which might induce him to change his residence. If he has in his contemplation some event upon the happening of which his residence will cease, it is not correct to call this even a present intention of making it a permanent home.'<sup>3</sup> At the same time, as his Lordship points out,<sup>4</sup> it does not have to be shown that the intention was immutable: 'In my judgment, the true test is whether he intends to make his home in the new country until the end of his days unless and until something happens to make him change his mind.'<sup>5</sup> The fact that a man contemplates departure in circumstances which are highly unlikely to materialize will not preclude the acquisition of a domicile of choice. A court may therefore be called upon to assess the improbability of the occurrence of such circumstances. To be relevant the contingency envisaged must, of course, be specific and clear cut. Buckley, L.J. said, 'The question can perhaps be formulated in this way where the contingency is not itself of a doubtful or indefinite character: is there a sufficiently substantial possibility of the contingency happening to justify regarding the intention to return as a real determination to do so upon the contingency occurring rather than a vague hope or aspiration?'<sup>6</sup> Buckley L.J. took the view that on the facts of the instant case, although the possibility of Mrs. Bullock's changing her mind and reconciling herself to life in Canada was so remote as to be unreal, the possibility of her predeceasing her husband was not an unreal one. The reality of this possibility is at the heart of the decision. The wife was only a few years younger than her husband, and both were in good health. He was almost as likely to survive her as she was to survive him.

The logic of Buckley L.J.'s judgment is relentless.<sup>7</sup> As an example of the application of well-established doctrine it cannot be faulted. But surely one may entertain some qualms about the result. A man, who had in effect lived continuously in England for some 40 years and who was almost as likely as not to continue doing so for the rest of his days, had not acquired a domicile here. One cannot but feel the force of Brightman J.'s words: 'It would, I think, be unduly cynical to treat the taxpayer's home at Lyme Regis as "fixed for a limited period" or "fixed for a particular purpose".'<sup>8</sup> An individual's 'personal law' at a given time should be the law of the community to which that

<sup>1</sup> [1976] 1 W.L.R. 1178, 1182-3.

<sup>2</sup> Ibid., 1183.

<sup>3</sup> Ibid., 1183, citing Lord Chelmsford in *Moorhouse v. Lord*, (1863) 10 H.L. Cas. 272, 285-6.

<sup>4</sup> Ibid., 1184.

<sup>5</sup> Ibid., 1185.

<sup>6</sup> Ibid., 1186.

<sup>7</sup> Somewhat ironically logic would also predicate that Mrs. Bullock was domiciled in Nova Scotia from the date of her marriage in 1946 at least until 1974.

<sup>8</sup> [1975] 1 W.L.R. 1436.

individual at that time in the most general sense belonged. The English concept of domicile has many shortcomings in this regard. Indeed these shortcomings have proved so serious that the retreat from domicile as a test of the personal law has already begun. Resort is being had by way of alternative to various forms of residence, to 'real and substantial connection', etc. But this in its turn will bring (and is already bringing) new difficulties. Perhaps therefore it is permissible, even at this late stage, to contemplate the reform and rehabilitation of domicile.

Various modifications would be possible within the framework of the existing law. The intention requirement could be made more flexible: an intention to remain 'for the foreseeable future' or 'for a considerable period' could be deemed to suffice for the acquisition of a domicile of choice. Again, a general intention to remain, but subject only to departure upon the happening of a particular contingency, could suffice unless the contingency was bound to occur and to do so within a short period of time: this would have led to a different result in the *Bullock* case. Or again, the rigid separation of the residence and intention requirements might be broken down. Long residence might compensate for lack of evidence of, or ambivalence concerning, intention.

Such relaxations would, however, do little more than cater for a few hard cases, and they might themselves increase rather than diminish the uncertainties involved in the determination of domicile. It is submitted that, if domicile is to survive as a test of the personal law, a more fundamental change is called for.

An investigation of domicile essentially is, or ought to be, an enquiry as to the location of a person's home or 'permanent' home at a specified moment in time. Traditionally this enquiry has been seen as involving a historical investigation. The starting point is the domicile of origin. Changes, abandonments and revivals are then traced chronologically through the life of the *propositus*. The domicile which he last achieved prior to the moment in time to which the enquiry relates is deemed to be frozen until that moment. This is indeed a curious and a negative way of answering what can be formulated as a straightforward and positive question: with which community was this person most closely connected at the material time? A more natural way of approaching the problem would be to focus first of all upon the facts existing at that time. Most people appear to have a home or principal place of residence at any given moment. Appearances may be deceptive, but normally they are not: the burden of proving the abnormal should be upon he who alleges it. In order to demonstrate that in a particular case the apparent home was not the true home and should not connote domicile, it might be appropriate to look backwards and consider the length of residence and/or to look forwards and investigate intention. But shortness of actual residence and lack of intention to remain for long would be simply evidentiary factors available to a party seeking to discharge the burden of showing that the case was abnormal. Intention would no longer itself be a criterion, and long residence would have greater significance than it is accorded under the present law. There would, of course, still be border-line cases, but the burden of proof should be a heavy one, and this would absorb most cases of uncertainty. Also, there will be some cases in which the *propositus* at the relevant time lacked even the appearance of a home. As the law must abhor a domiciliary vacuum, it would then (but only then) be necessary to look back to the last home, or in the case of the *propositus* who has enjoyed a life of unbroken homelessness to the domicile of origin. One may suppose that such cases would be rare.

What is advocated here is not new. It is reminiscent of, and is an elaboration of, the recommendations contained in the First Report<sup>1</sup> of the Lord Chancellor's Private

<sup>1</sup> Cmd. 9068 (1954).



International Law Committee which was published as long ago as 1954. Four years later these recommendations were embodied in a Domicile Bill, clauses 2, 3 and 4 (1) of which ran as follows:

2. Subject to section five of this Act, a person's domicile is in the country in which he has his home and intends to live permanently.
3. (1) Subject to subsection (2) of this section, a person who has a home in a country is presumed to intend to live permanently in that country.  
(2) If a person has a home in more than one country he is presumed to intend to live permanently in that one of them with which he is most closely connected.
4. (1) The presumptions set out in section three of this Act may be displaced by proof of a different intention.

Had these proposals become law the determination of domicile would have ceased to involve a chronological investigation. Moreover, although intention would have remained as a formal criterion, the effect of the presumptions set out in clause 3 would usually have been to dispense with proof of it in practice.

In fact the Domicile Bill never became law.<sup>1</sup> Several years later in its Seventh Report published in 1963 the Lord Chancellor's Private International Law Committee re-affirmed that 'Our law of domicile would be improved if the approach to the problem were changed in the way recommended in the Committee's First Report'.<sup>2</sup> The legislature again failed to act.

A commentator may be permitted to express the hope, although perhaps a somewhat forlorn one, that the House of Lords would still take the opportunity, should it present itself, to remedy Parliament's failure by overruling their previous constrictive decisions and restating the English law of domicile in broad terms of the historic equation of domicile with home. The bluff words of Lord Cranworth uttered in *Whicker v. Hume* as long ago as 1858 that 'By domicile we mean home, the permanent home; and if you do not understand your permanent home, I am afraid that no illustration drawn from foreign writers or foreign languages will very much help you to it'<sup>3</sup> might today bear the gloss that illustrations drawn from subsequent case law, in the tradition of which the Court of Appeal's decision in *Inland Revenue Commissioners v. Bullock*<sup>4</sup> squarely stands, will be of no greater assistance.

### *Recognition of divorces: the nature and location of proceedings*

*Case No. 2.* Statutes are couched in words, and words lack precision. Moreover, the intended import of a sentence may not be best discovered by pre-occupation with

<sup>1</sup> This Bill was the subject of considerable correspondence in *The Times* newspaper. For an unanswerable defence of its provisions from the formidable pen of Dr. Cheshire see his letters published in the issues of 2 March 1959 and 15 April 1959. In the earlier of these letters he indicated the nature of the opposition to the Bill which in the event prevailed. 'The new proposals were welcomed in legal circles, accepted by the Government and effect was given to them in the Bill laid before the House of Lords in June 1958. In the course of its second reading the Lord Chancellor thanked the committee for their proposals and expressed his satisfaction that these would now enable Great Britain to adhere to an international convention on another subject concluded at The Hague in 1951, which "would simplify the task of the courts and all who gave advice on a particularly difficult legal question". Then something occurred that must surely be unique in the history of English legislation. American business men resident in England represented to the Government that the *Winans* doctrine should be retained, not abolished. Though not part of their own law, they claimed that it should remain operative in England.' The Bill was also powerfully defended by Sir Otto Kahn-Freund in his letter (13 March 1959) and by the President and Secretary-General of The Hague Conference on Private International Law in their letter (31 March 1959).

<sup>2</sup> Cmd. 1955 (1963), para. 34 (1).

<sup>3</sup> (1858) 7 H.L. Cas. 124, 160.

<sup>4</sup> [1977] 1 W.L.R. 1178.



consideration of the meaning traditionally attaching to the individual words which go to make it up. A commentator<sup>1</sup> on the recent case of *R. v. Registrar General, ex p. Minhas*,<sup>2</sup> having drawn attention to the 'failure' of the draftsman of the Recognition of Divorces and Legal Separations Act, 1971, to attempt a definition of the word 'proceedings' as used in section 2 (a) of the Act, has written that 'it is regrettable that academic eagerness<sup>3</sup> to explore the nature and scope of this requirement has not been shared by the courts'.<sup>4</sup> To the extent that the exploratory zeal referred to has taken the form of little more than linguistic probing the present writer does not share this regret.

The 1971 Act differentiates for recognition purposes between divorces and judicial separations granted in the British Isles and overseas divorces and legal separations. In Section 2 the latter are defined as

. . . divorces and legal separations which—

(a) have been obtained by means of judicial or other proceedings in any country outside the British Isles; and

(b) are effective under the law of that country.

The question before the Divisional Court in *R. v. Registrar General, ex p. Minhas* was as to whether a talaq divorce was in the circumstances of the case an overseas divorce within the meaning of this section. An applicant was seeking an order of mandamus to compel the Registrar General to issue authority to perform a marriage between himself and a third party. The facts were summarized by Park J., who delivered the judgment of the Court, as follows. 'The applicant was born in Pakistan in 1936. In 1956 he married Khudeja Begum. In 1961 he came to this country. His wife refused to follow him and she has been resident in Pakistan ever since that time. Eventually, the applicant was granted British nationality; but he also retained his Pakistan nationality, so he is in fact a dual national. On February 24, 1973, he sent to his wife from this country a copy of a document informing her that he had pronounced to her three times the words: "I divorce you". He also sent notice of this pronouncement to the chairman of the Salasi Council of the Union Committees at the place where his wife was residing at the time of the pronouncement of the talaq. In so doing, he complied with the provisions of section 7 of the Muslim Family Laws Ordinance 1961. Nearly three months later, on May 20, he went to Pakistan and appeared before the Salasi Council. On May 23, which is three months after he had pronounced the talaq in this country, he was granted a divorce and obtained a certificate to that effect.'<sup>5</sup> The evidence of an expert on Islamic law, which was accepted as correct by the applicant, was summarized by the learned judge thus: 'It appears from the affidavit that the letter which the applicant wrote on or about February 24 to his wife was a valid talaq divorce in classical Sunni law, as understood and applied on the Indian sub-continent. The talaq was fully pronounced as soon as the words were written on the paper; the effect of the Family Laws Ordinance, however, was that the pronouncement of the talaq was revocable within a period of 90 days from the date upon which the notice of the pronouncement was delivered to the chairman of the Salasi Council. Subject to that, the marriage was brought to an end immediately on the pronouncement of the

<sup>1</sup> E. M. Clare Canton.

<sup>2</sup> [1976] 2 W.L.R. 473.

<sup>3</sup> See, e.g., North, *Law Quarterly Review*, 91 (1975), p. 36; Polonsky, *International and Comparative Law Quarterly*, 22 (1973), p. 343. But see, too, Jaffey, *Law Quarterly Review*, 91 (1975), p. 320.

<sup>4</sup> *International and Comparative Law Quarterly*, 25 (1976), p. 909 at p. 910.

<sup>5</sup> [1976] 2 W.L.R. 473, 775-6.

talaq. It was mandatory, in accordance with Pakistan law, for the applicant to give notice of the talaq to the appropriate chairman as defined by the ordinance, which is what he did. If reconciliation did not succeed, or if the husband did not revoke the talaq before the expiration of 90 days from its pronouncement, the talaq became automatically operative and effective. It was not necessary for the purpose of obtaining the divorce to have proof of any sort of hearing before the council; the divorce certificate which the applicant obtained was not issued under any provisions of Pakistan law and had no legal effect. Thus, the only mandatory requirements in the ordinance were: (i) to deliver a notice of the talaq to the appropriate chairman; (ii) to prove that he had attempted to make the wife aware that the chairman had received a copy of this notice.<sup>1</sup>

The court held that the divorce was not an overseas divorce and that it could not therefore be recognized in England. There was no doubt that the divorce was effective under the law of Pakistan: section 2 (b) was therefore satisfied. The decision turns on section 2 (a). Park J. said, 'On the evidence of Dr. Pearl [the expert witness] the acts whereby the divorce was obtained were the pronouncement of the talaq; the service of the notice on the chairman, and the sending of the copy to the wife. The pronouncement of the talaq occurred in the British Isles; I am not persuaded that the two documents sent were proceedings wherever they occurred. As to what happened in Pakistan, that was not an activity as a result of which a divorce was obtained.'<sup>2</sup> There are thus two related problems of interpretation. One is as to what constitutes proceedings, the other is as to their geographic location.

So far as the former is concerned, although the words 'or other' in section 2 (a) might with grammatical propriety be construed as connoting no more than that the proceedings need not be judicial, they might sensibly be regarded as in addition indicating some relaxation of the elements of formality and of 'official' participation traditionally associated with the notion of proceedings. Indeed it seems to be implicit in Park J.'s words that had the talaq in the instant case been pronounced in Pakistan, the divorce would have been recognized in England. The measure of formality and the measure of 'official' participation necessary for an event or series of events to constitute 'proceedings' are matters of degree, and attempts at definition must be largely futile. What is important is that, given the section 2 (b) requirement of efficacy by the law of the country of putative rendition and given the other safeguards embodied in the Act, especially in section 8, the courts should lean heavily against denying recognition to foreign divorces by placing a legalistic or dictionary-orientated interpretation on the single word 'proceedings' in section 2 (a).

The geographic location of proceedings when there has been human activity and/or legal consequences in more than one country can be a more complex matter.

First it must be remembered that the quest is for the place not the time of the divorce. Section 7 (3) of the Muslim Family Laws Ordinance 1961 provides:

(1) Any man who wishes to divorce his wife shall, as soon as may be after the pronouncement of talaq . . . give the chairman [of the Salasi Council] notice in writing of his having done so, and shall supply a copy thereof to his wife . . .

(2) . . .

(3) . . . a talaq . . . shall not be effective until the expiration of 90 days from the day on which notice . . . is delivered to the chairman.

(4) Within 30 days of the receipt of notice . . . the chairman shall constitute an arbitration council.

<sup>1</sup> Ibid., 475-6.

<sup>2</sup> Ibid., 477.



It is clear that these provisions, which are mandatory, refer to events in Pakistan. It is also clear that a divorce is not effective until a date to be determined by reference to these events. It does not follow, however, that because the timing of a divorce is determined by events taking place overseas, the divorce took place overseas. The occurrence of the last necessary event obviously determines time, but it does not necessarily determine place.

It was contended on behalf of the Registrar, who opposed the application, that on the true construction of section 2 (a) both the obtaining of the divorce and the proceedings must be in the foreign country. The wording of the sub-section is perhaps ambiguous. Do the words 'in any country outside the British Isles' qualify 'obtained' or 'proceedings' or both? This ambiguity would fall to be resolved in, for example, a case in which a petitioner, although fully participating by correspondence in foreign proceedings, remained in England throughout. It is submitted that in such a case there would be compliance with the requirements of the sub-section. In other words we would be concerned only with the location of the proceedings and not with that of the activities of the petitioner as such.

Difficulty arises if the petitioner's activities are regarded, as often they reasonably may be, as themselves being part of the proceedings. This leads on to the central question, which is as to how many and which of the events necessary for the efficacy of the process of divorce must have taken place in the foreign country of putative rendition for the divorce to qualify as an 'overseas' divorce? An extreme answer to this question would be that all such events must have taken place in that country. An answer based upon a confusion, to which reference has already been made, between time and place would be in terms of the place of the last necessary event. An arbitrary answer could be based upon the location of some particular event, such as the institution of the proceedings or the pronouncement of the decree. Moderation and rationality, it is submitted, require an approach of greater flexibility. Proceedings should be deemed to be located in the country in which the activity (and not, of course, only the petitioner's activity) essential to the efficacy of the process substantially takes place. Like all flexible tests this may lead to uncertainty in some cases. In the case of judicial or other divorces in which officials play a dominant role, greater and often conclusive weight might be attached to the place in which they exercise that role. Where the role of the official is minimal, greater significance should attach to the place in which the parties, particularly the petitioner, have acted. On this basis the actual decision in *R. v. Registrar General* is clearly unexceptionable. It is, however, a matter for regret that the Divisional Court dealt so cursorily and in a somewhat *ad hoc* way with the matter, there being no attempt to lay down even in the broadest terms any guide-lines for future cases on the interpretation of a section of a relatively new and important statute.

### *Succession and status*

*Case No. 3.* It is always dangerous to isolate a legal issue from the context in which it arises. These dangers are perhaps especially liable to lurk when the legal issue is as to status. Thus, when a question arises as to a person's legitimacy or alternatively his subsequent legitimation, the possibly crucial relevance of the context should not be overlooked. That context is often succession on death or under a settlement, and in a conflict of laws situation resort must first be had to the *lex successionis* as the law governing the 'main' question, rather than to the *forum's* choice of law rules governing the status of the claimant, although a logically subsequent issue as to his status may arise 'incidentally'. Suppose, to take a strong case, a deceased has died intestate leaving land



in Germany and it is clear that a German court would regard the claimant as entitled to succeed as legitimate heir, it would then be verging upon the bizarre for an English court to decline to recognize his entitlement on the ground that, had the issue of his legitimacy arisen in England, he would have been regarded as a bastard. The point can be put in doctrinal terms. Choice of law rules relating to succession are *renvoi* rules: resort to the *lex successionis* therefore involves the application of the domestic rules which would be applied to the actual facts of the instant case by a court sitting in the indicated foreign country. Consequently any 'incidental' question such as legitimacy falls to be dealt with in the way in which that foreign court would deal with it in the same context.

In a case in which the *lex successionis* and the *lex fori* coincide the same approach is apposite, but its significance is often muted in that the *forum's* choice of law rules relating to status may be applicable because they are also the rules of the *lex successionis*. However a further question may then arise as to the scope of these choice of law rules. This is a question as to the extent of the reference to the law governing status. It was a question of this type that arose in the recently reported<sup>1</sup> Scots case, heard in the Court of the Lord Lyon, of *Viscount Drumlanrig's Tutor, Petitioner*.<sup>2</sup>

Section 5 (1) of the Legitimation (Scotland) Act 1968 provides *inter alia* that references in the Act to the legitimation of a person 'shall . . . be construed as including references to the recognition under the law of Scotland . . . of a person as being legitimated under the law of a country or territory outside Scotland by the subsequent marriage of his parents'. Section 8 (4) provides that 'The provisions of this Act shall have effect in relation to any question as to the succession to, or devolution of, any title, honour, or dignity after the commencement of this Act as if the right to succeed to that title, honour or dignity were a right under a deed coming into operation after such commencement and as if the title, honour or dignity devolved in accordance with such a deed.'

The Legitimacy Act 1926, which extends only to England and Wales, provides by s. 10 that 'Nothing in this Act shall affect the succession to any dignity or title of honour or render any person capable of succeeding to or transmitting a right to succeed to any such dignity or title'.

In the instant proceedings the Marquis of Queensberry (hereinafter referred to as the petitioner), the holder of a Scots marquisate, presented a petition, as tutor and administrator at law of his pupil child, Viscount Drumlanrig (hereinafter referred to as the claimant), to the Lord Lyon King of Arms for matriculation of the arms suitable to the claimant as his eldest lawful son and as heir-apparent to the marquisate.

The claimant had been born in England where both his parents were domiciled. At the date of his birth his father (the present petitioner) was married to a woman other than the claimant's mother. His mother was unmarried. The petitioner subsequently obtained an English divorce which would be recognized in Scotland and a month later he married the claimant's mother. The effect of this marriage by English domestic law was to legitimate the claimant but not so as to entitle him to succeed to 'any dignity or title of honour'. By virtue of section 5 of the Legitimation (Scotland) Act 1968 this English legitimation would be regarded in Scotland as valid and sufficient for the purposes of that Act. One of the express purposes of that Act is to regulate 'any question as to the succession to, or devolution of, any title honour or dignity . . .' (section 8 (4): see *supra*). In his judgment the Lord Lyon King of Arms (Grant) put the position this way: 'We thus have the strange situation in which a person legitimated in England

<sup>1</sup> The hearing was as long ago as February 1973.

<sup>2</sup> [1977] Scots L.T.R. 16.

by the subsequent marriage of his parents is debarred from succeeding to a dignity or title in England, but suffers no such impediment in relation to Scottish titles, honours and dignities. Is it possible that a Scottish statute can, as it were, adopt an English legitimation burdened with the serious restriction above mentioned, and apply it to Scotland freed from this restriction? My view is that it can and does.<sup>1</sup> It is submitted with respect that this is clearly right. It might at first sight appear to involve giving greater effect to the English legitimation in Scotland than would be accorded to it in England. But a moment's reflection makes it clear that this is not the case unless it is thought that an English court would not defer to Scots law when considering the entitlement of a claimant to a Scots 'dignity or title of honour'.

The *lex successionis* in such cases is the law of the country under which the dignity or title is conferred.<sup>2</sup> This is the starting point of the decision in the *Viscount Drumlanrig's Tutor, Petitioner* case. It so happens that Scots law was both *lex fori* and *lex successionis*, but it was as the latter that Scots law was applied. The Lord Lyon said, '... it is clear that if the Marquessate of Queensberry had been an English Peerage, Sholto [the claimant] could not have been regarded as the heir-apparent thereto. ...'<sup>3</sup> In applying Scots law as the *lex successionis* the Scots court applied the recognition rules embodied in section 5 (1) (a) of the Legitimation (Scotland) Act 1968, and thus recognized the English legitimation. The reference to English law was, however, limited to the issue of status and did not extend to succession rights.

The correctness of this approach may be contrasted with the error in an analogous English case on adoption. In *In re Marshall*<sup>4</sup> the *lex successionis* was English law. The claimant had been adopted in British Columbia. Harman J., the trial judge, was willing to recognise this adoption; but he would not allow the adopted child to take under the will of an English testator, because, although the law of British Columbia conferred upon the parties to an adoption the status of parent and child, for the purposes of inheritance and succession it was only in the case of a will made by the adopting parent that the word 'child' could be deemed to include adopted child. The learned judge seems to have been blind to the fact that the main question was one of succession governed by English law, and that the status of the child only arose incidentally in that context. The validity of the adoption properly fell to be determined by the law of British Columbia, but any question as to the succession rights of a validly adopted child should have been referred to English law as the law governing succession. To take another example, suppose the question had been as to whether a woman could take as widow on a Scottish (or English) intestacy. The validity of a marriage ceremony between the claimant and the deceased celebrated in Ruritania at a time when both parties were domiciled there would surely be tested by reference to Ruritanian law; but, assuming the validity of the marriage, the lady's succession rights would undoubtedly be determined by the Scottish (or English) *lex successionis*. So in *Viscount*

<sup>1</sup> [1977] Scots L.T.R. 16, 17.

<sup>2</sup> Although section 8 of the English Act broadened the basis of recognition of foreign legitimations, and the provisions of this section are clearly within the ambit of the word 'Act' in section 10, no part of the Act would be applicable in a succession case unless either the *lex successionis* was English law or English law would be applicable by a court sitting in the *forum* of a foreign *lex successionis*.

<sup>3</sup> [1977] Scots L.T.R. 16, 17.

<sup>4</sup> [1957] Ch. 263. This decision was affirmed by the Court of Appeal, [1957] Ch. 507, although on the then more defensible ground that in construing an English will only those children placed by adoption in a position, both as regards property rights and status, substantially equivalent to that of natural children could be treated as being within the testator's contemplation.



*Drumlanrig's Tutor, Petitioner*, although the English legitimation was recognized in Scotland, the succession rights of the legitimated claimant were assessed by reference to the Scots *lex successionis*.

*Service out of the jurisdiction: frustrated contracts*

*Case No. 4.* The facts of *B.P. Exploration Co. (Libya) Ltd. v. Hunt*<sup>1</sup> were as follows. The plaintiffs and the defendants had in 1960 made an agreement in England for the exploitation of an oil concession granted to the defendants in Libya, the agreement providing for the sharing of profits and other benefits. In 1971 the plaintiffs', and in 1973 the defendant's, interests in the oil concession were nationalized by the Libyan government. The plaintiffs then issued a writ for a declaration that the agreements had been frustrated by the nationalization, and *inter alia* claimed, pursuant to the Law Reform (Frustrated Contracts) Act 1943, sums in respect of valuable benefits obtained by the defendant under the agreements. The defendant, a resident of Texas, refused through agents to accept service in England, and the plaintiffs obtained leave under R.S.C. Ord. 11, r. 1 (1) (f), to serve notice of the writ in Texas. The question before Kerr J. was as to whether this service of notice outside the jurisdiction should be set aside.

R.S.C. Ord. 11, r. 1 (1) (f), permits service out of the jurisdiction if the action is brought '... to enforce, rescind, dissolve, annul or otherwise affect a contract, or to recover damages or obtain other relief in respect of the breach of a contract ... which (i) was made within the jurisdiction, or ... (iii) is ... governed by English law'.

The learned judge held that 'A claim for a declaration that a contract has become discharged, whether as the result of frustration, repudiation, or otherwise, is in my view a claim which affects the contract in question'.<sup>2</sup> Having noted the width of the words 'or otherwise affect', Kerr J. very properly rejected the pseudo-conceptual argument that if a contract has been discharged it is 'an ex-contract, a corpse, and that there is therefore no longer any contract which can be "affected"'.<sup>3</sup> His Lordship similarly held, on the basis that the proper law of the contract was English in compliance with section 1 (1)<sup>4</sup> of the Law Reform (Frustrated Contracts) Act 1943, that a claim under section 1 (3) of that Act is also a claim which 'affects' a contract. Section 1 (3) deals with pre-frustration benefits conferred by one party upon the other: 'Where any party to the contract has, by reason of anything done by any other party thereto in, or for the purpose of, the performance of the contract, obtained a valuable benefit (other than a payment of money to which the last foregoing subsection applies) before the time of discharge, there shall be recoverable from him by the said other party such sum (if any), not exceeding the value of the said benefit to the party obtaining it, as the court considers just. ...' Kerr J. drew attention<sup>5</sup> to the incongruity which would be involved in holding that an English court could give leave to serve an absent defendant where the plaintiff claims that an English contract has become frustrated, but that, if this issue is decided in favour of the plaintiff, it would then have to be left to a foreign court to decide the consequences between the parties which might flow under the 1943 Act.

The importance of *B.P. Exploration Co. (Libya) Ltd. v. Hunt* is specific. The case neatly decides two points concerning the scope of Ord. 11, r. 1 (1) (f) of the Rules of the Supreme Court—two points upon which earlier authority was curiously lacking.

<sup>1</sup> [1976] 1 W.L.R. 788.

<sup>2</sup> [1976] 1 W.L.R. 788, 795.

<sup>3</sup> *Ibid.*, 795.

<sup>4</sup> The sub-section restricts the effect of the Act to contracts 'governed by English law'.

<sup>5</sup> [1976] 1 W.L.R. 788, 796.



One more general observation may be briefly made. Kerr J. prefaced<sup>1</sup> his judgment with an invocation of the oft-quoted words of Farwell L.J. in *The Hagen*<sup>2</sup> to the effect that jurisdiction to allow service on an absent defendant is to be exercised with caution, and that doubts should be resolved in favour of the foreigner. The policy underlying these words is undoubtedly correct, but it is to be achieved by the exercise of the broad discretion which stems from the non-mandatory nature of Ord. 11. Rule 1 (1) of the Order lists the principal cases in which service out of the jurisdiction 'is permissible'. Rule 4 (2) provides, 'No such leave shall be granted unless it shall be made sufficiently to appear to the Court that the case is a proper one for service out of the jurisdiction under this Order.' In the light of this overriding discretion no cautionary bias is called for when considering the scope of the individual cases listed in Ord. 11, r. 1 (1). Kerr J. kept distinct and treated separately the problems of the interpretation of r. 1 (1) (f) and the exercise of his general discretion. This provides a welcome contrast with some of the earlier case-law<sup>3</sup> concerned, for example, with the scope of r. 1 (1) (h), which permits service out of the jurisdiction 'if the action begun by the writ is founded on a tort committed within the jurisdiction'.

In the instant case, having found for the plaintiff on the interpretation points, the learned judge went on to hold in his discretion that, having regard to all the circumstances, including the fact that England was the *forum conveniens*, leave to serve notice of the writ outside the jurisdiction had been properly granted.

P. B. CARTER

<sup>1</sup> [1976] 1 W.L.R. 794.

<sup>2</sup> [1908] P. 189, 201.

<sup>3</sup> e.g. *Kroch v. Rossell*, [1937] 1 All E.R. 725; *George Monro Ltd. v. American Cyanamid and Chemical Corporation*, [1944] K.B. 432; *Bata v. Bata*, [1948] W.N. 366.

# DECISIONS ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS DURING 1975–1976\*

## A. DECISIONS OF THE EUROPEAN COURT OF HUMAN RIGHTS

*Right to form and join a trade union (Article 11)—a right that one's trade union be heard—no right that a trade union be consulted—application of Article 14*

*Case No. 1. National Union of Belgian Police case.*<sup>1</sup> In Belgium, the police consist, in approximately equal numbers, of the municipal police and policemen in the two State police forces (the *gendarmerie* and the *police judiciaire près les parquets*). The National Union of Belgian Police is a trade union which is open to all members of the former. In 1974, it had a little under a half of their number as its members. The two State police forces have their own separate trade unions. In the present case, the National Union of Belgian Police complained of the refusal of the Belgian Government to classify it as a 'representative' trade union under the Royal Decree of 2 August 1966. As a result, it did not have the right to be consulted by the Government on such questions as staff structures, recruitment, promotion, and pay. This refusal was based upon the fact that the National Union of Belgian Police was not open to all local government employees as the Decree required. It was instead open only to the police, who constituted less than 10 per cent of all provincial and municipal employees. Three unions which were open to local government employees generally (and which had municipal police among their members) were 'representative' trade unions and were consulted accordingly. This situation had, the applicant union alleged, been the cause of its undoubted decline in membership and was a violation of Article 11 by itself and of Articles 11 and 14 read together.

The Court held unanimously that there had been no violation of Article 11 taken by itself. In reaching this conclusion, it agreed with the Commission, which had referred the case to it, but for different reasons. The Commission had taken the view, by 8 to 5, that the wording 'for the protection of his interests' in Article 11 (1)<sup>2</sup> meant that individuals must not only be allowed 'to form and to join' a trade union but that the trade union formed or joined must be able to act effectively to protect its members' interests. Article 11, that is, had a functional as well as an organizational aspect. The majority also considered that, in its functional aspect, Article 11 guaranteed the right to consultation<sup>3</sup> because it was necessary to a trade union's effective functioning in defence of its members' interests. The right was not, however, an absolute one and

\* © D. J. Harris, 1977.

<sup>1</sup> A. 4464/70. Decision as to admissibility: *Yearbook of the European Convention on Human Rights*, 15 (1972), p. 288. Report of the Commission adopted on 27 May 1974. European Court of Human Rights (cited in these notes as *E.C.H.R.*), Judgment of 27 October 1975. French text authentic. The case was heard by the plenary Court: Rule 48, Rules of Court.

<sup>2</sup> Article 11 (1) reads: 'Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.'

<sup>3</sup> Note that the Commission expressed itself in its report in terms of a right to consultation, which is wider than the right to be consulted in issue on the facts. It is still narrower, however, than the Court's right to be heard (see below), which does not just apply at the stage when the State is considering action affecting a trade union's members.

the limitation imposed by Belgian law was permissible as being based upon a criterion, viz. representativeness, which had an acceptable public purpose. The minority of the Commission had reached the same conclusion that no breach of Article 11 had occurred (so that the Commission, like the Court, was unanimous), but by a different route. In its view, the words 'for the protection of his interests' were *ex abundante cautela*; Article 11 contained only an organizational aspect.

The Court followed a path somewhere between the two chosen within the Commission. It first rejected the view of the majority of the Commission that the right to be consulted was a necessary condition of effective trade union activity on behalf of its members. Its absence, as a right, from the European Social Charter,<sup>1</sup> which post-dated the Convention and could not be interpreted as taking a retrograde step in this regard, was evidence to support this view, as was the fact that it was not generally found in the law of the contracting parties. At the same time, the Court rejected the view of the minority of the Commission that the words 'for the protection of his interests' were redundant:

These words, clearly denoting purpose, show that the Convention safeguards freedom to protect the occupational interests of trade union members by trade union action, the conduct and development of which the Contracting States must both permit and make possible . . . . What the Convention requires is that under national law trade unions should be enabled, in conditions not at variance with Article 11, to strive for the protection of their members' interests.<sup>2</sup>

What this meant in the present context was that 'the members of a trade union have a right, in order to protect their interests, that the trade union should be heard'.<sup>2</sup> This *was* necessary to the effective functioning of a trade union in the protection of its members' interests, although exactly how a State ensured that a trade union was heard was left to a considerable extent to its discretion. Allowing a trade union the right to be consulted was one such method, but there were others. Looking at the position of the applicant trade union under Belgian Law and practice, the Court considered that its right to be heard was respected:

No-one disputes the fact that the applicant union can engage in various kinds of activity vis-à-vis the Government. It is open to it, for instance, to present claims and to make representations for the protection of the interests of its members or certain of them. Nor does the applicant union in any way allege that the steps it takes are ignored by the Government. In these circumstances, the fact alone that the Minister of the Interior does not consult the applicant under the Act of 27th July 1961 does not constitute a breach of Article 11 §1 considered on its own.<sup>3</sup>

The Court also held, by 10 to 4, that there was no violation of Article 11 read in conjunction with Article 14. Here again it confirmed the opinion of the Commission, which had been unanimous on this point. The Court first established that Article 14 applied to the case. Although the 1966 Decree was not in violation of Article 11 taken by itself, it could be in breach of Article 11 as read with Article 14 because the right to be consulted was one of the ways in which a right that was protected by Article 11, viz. the right of the members of a trade union that their union be heard in the protection of their interests, could be secured. Since Belgium had chosen to rely upon consultation as a means of honouring its obligation under Article 11, the question arose

<sup>1</sup> Article 6 (1) only requires the contracting parties to '*promote*' joint consultation between workers and employers (*italics added*).

<sup>2</sup> Judgment, para. 39.

<sup>3</sup> *Ibid.*, para. 40.



whether the system of consultation which it had established complied with Article 14. The only judge to dissent from the Court's approach in this regard was Judge Fitzmaurice. In the course of a general criticism of the Court's approach to Article 14 in its earlier judgment in the *Belgian Linguistics* case,<sup>1</sup> upon which the Court relied in the present case, Judge Fitzmaurice argued that there could be no violation of Article 14 because the right to be consulted was, as the Court itself had held, not protected by Article 11. There was, therefore, no right 'set forth' (Article 14) in the Convention in respect of which discrimination could be alleged.<sup>2</sup>

The burden of the applicant's complaint under Article 14 was that it was, as a category-based union, discriminated against vis-à-vis unions open to all municipal and provincial employees in the matter of consultation as a result of the 1966 Decree. Following the *Belgian Linguistics* case, the Court first ruled that the Decree had an 'objective justification'. This, as the Government had argued, was to be found in the avoidance of 'trade union anarchy' and the attainment of 'a coherent and balanced staff policy, taking due account of the occupational interests of all provincial and communal staff'.<sup>3</sup> This was in itself 'a legitimate aim' and there was no reason to suppose that the Government had some ulterior, unacceptable motive, such as the preference of politically committed trade unions. The question then was whether the undoubted disadvantage which the members of the applicant trade union suffered was consistent with the 'principle of proportionality'. In the opinion of the majority of the Court it was. There was little doubt that this was true so far as matters affecting the police but common to all local government employees were concerned. There was more doubt in respect of matters just affecting the police (e.g. conditions for the appointment of police superintendents and deputy superintendents, which had been the subject of separate regulation), but even here, on balance, the Decree was justified:

These specific matters represent only a part of the matters subject to obligatory consultation. Moreover, special questions may also arise concerning various other categories of provincial and municipal staff, which, if they were to combine in category-based trade unions, would have no right to consultation either. It is understandable therefore that the Government has not felt bound to make exceptions which might have finished by leaving the rule laid down in Article 2 §2 of the Royal Decree of 2nd August 1966 devoid of significance. The court is of the opinion that the uniform nature of the rule does not justify the conclusion that the Government has exceeded the limits of its freedoms to lay down the measures it deems appropriate in its relations with the trade unions.<sup>4</sup>

All four of the dissenting judges agreed with the majority of the Court that the 1966 Decree met the requirement of purpose; their dissent was on the question of proportionality. For Judge Zekia, the disadvantage suffered by the applicant union in respect of all matters concerning its members was not outweighed by the modest administrative inconvenience that would result from allowing it the right to be consulted. In a joint opinion, Judges Wiarda, Ganshof Van der Meersch, and Bindschedler-Robert agreed with the majority as far as matters concerning policemen as municipal or provincial employees were concerned; the 'representative' unions could act for them adequately

<sup>1</sup> *E.C.H.R.*, Judgment of 23 July 1968.

<sup>2</sup> Judge Fitzmaurice's judgment also examines again the question of the general approach to the interpretation of the Convention on which he had disagreed with the Court in the *Golder* case: see the note on that case in this *Year Book*, 47 (1974-5), p. 391.

<sup>3</sup> Judgment, para. 48.

<sup>4</sup> *Ibid.*, para. 49.

in respect of such matters. There were, however, other matters that were peculiar to the employment of policemen and that were commonly regulated separately. In so far as these matters were concerned, the requirement of proportionality was not met.<sup>1</sup>

The case, which was the first to reach the Court on the interpretation of Article 11, is of importance because of the guidelines it sets for the operation of the Convention in the field of trade union rights, or, more accurately, those of their members. Although, as usual, the Court was careful to decide only what it had to decide, its judgment, together with those in the two cases which immediately followed it,<sup>2</sup> does set some landmarks in respect of issues in an extremely controversial area of law which are likely to be ventilated in further applications as the boundaries of Article 11 are explored.

The most important ruling is that, as applied to trade unions, Article 11 has a functional as well as organizational aspect, although not to the extent that the majority of the Commission had supposed.<sup>3</sup> In particular, the 'right' to be consulted is not a part of it, although the right of a trade union member that his trade union be heard in the defence of his interests is and the 'right' to be consulted may play a part in the realization of that more general right. What combination of circumstances will amount to a violation of the right to be heard remains to be seen. The Court has emphasized the reality of the situation: the test is whether the trade union concerned is able, one way or another, to present its members' case. The Court did not indicate what other rights, in addition to the right to be heard, need to be safeguarded so that a trade union can function effectively in the interests of its members as required by Article 11. An obvious candidate to which Judge Fitzmaurice referred is the right to take collective action, including the right to strike. This is a question that was not taken up by the Court in the present case, but which was raised by it later in the *Schmidt and Dahlström* case discussed below.<sup>4</sup> The Court's reference to the European Social Charter, which is the little-known counterpart to the European Convention on Human Rights in the field of economic and social rights,<sup>5</sup> is of interest in this connection because several States that are parties to it and to the Convention have been found to be in breach of Articles 5 and 6 of the Charter which concern areas that overlap with Article 5 of the Convention as now interpreted by the Court. It might be that the system of supervision in the Convention, with the possibility of individual applications, will serve as a valuable supplement to the report system of the Charter in respect of trade union rights.

A question which the Court might have considered, but obviously preferred to leave aside, was whether Article 11 controls action by employers in the sense that the State is under an obligation to exercise its public power to ensure effective trade union activity in employer-employee relations. Although the Commission had determined unanimously in its report that Article 11 did control labour relations in this

<sup>1</sup> Judge Fitzmaurice would have taken the same view had he held that Article 14 applied to this case.

<sup>2</sup> See Cases Nos. 2 and 3 below.

<sup>3</sup> Presumably the Court could have reached its conclusion that there was a functional aspect to Article 11 not on the basis that the words 'for the protection of his interests' are not redundant but by emphasising the definition of a 'trade union'. The two approaches merge in so far as the wording 'for the protection of his interests' can be seen as offering an outline definition of a trade union (although this does make them *ex abundante cautela*).

<sup>4</sup> Case No. 3.

<sup>5</sup> See Evans, 'The European Social Charter', in Bridge *et al.* (ed.), *Fundamental Rights* (1973), p. 278.



way, the Court did not deal with the matter.<sup>1</sup> This was presumably because the case concerned a police trade union and, whatever the theoretical position (was the State acting *qua* State or as employer? If the latter, did Article 11 contain a rule making the State *qua* State liable for the acts of employers?), Article 11(2) made it clear, with its express reference to the 'police', that Article 11 applied to the police and regulated State action controlling their freedom to organize.

The Court's ruling on the claim under Article 14 provides an example of the meaning of the wording 'other status' in Article 14. It was the applicant's status as a category-based union that was the reason for the disadvantage it suffered and this was sufficient to raise the question whether the disadvantage amounted to a discrimination against it contrary to Article 14. The view of Judge Fitzmaurice that Article 14 did not apply to the facts of the case because no right 'set forth' was in issue is not persuasive if one accepts (i) that the right to be heard is a right protected by Article 11 and (ii) that an implied right can be said to be 'set forth'.<sup>2</sup> The difference between Judge Fitzmaurice and the Court is then a question of the level at which the right is pitched (no right to consultation, but a more general right to be heard) and not the presence or absence of a right protected.

The Court's ruling on both claims (under Article 11 and under Article 11 read with Article 14) brings out the inherent conflict between the human rights and collectivist aspects of the right to organize.<sup>3</sup> Clearly, the right of the individual to form and join the trade union of his choice is limited by such systems for the recognition of trade unions as that which the 1966 Decree involved. This is demonstrated by the effect that the refusal of the right to be consulted had had upon the applicant's membership. But the effectiveness of trade unions as social institutions is equally clearly increased by such schemes, the legitimacy of which the Court, in accordance with the attitude prevalent in the national law of the contracting parties, is prepared to recognize.

*Right to form and join a trade union (Article 11)—application of Article 11 to the State qua employer—no right that collective agreements be made with a trade union—application of Article 14*

*Case No. 2. Swedish Engine Drivers' Union case.*<sup>4</sup> The applicant trade union, the Swedish Engine Drivers' Union (*Svenska Lokmannaförbundet*), is open to employees of the Swedish State Railways who are crewmen or persons from whom crewmen are recruited. In 1975, its membership, which was in decline, was about 1,000, or approximately 20 to 25 per cent of those eligible. Most crewmen belonged instead to the Railwaymen's Section of the State Employees' Union (*Statsanställdas Förbund*). This second union was one of the big three federations of trade unions of State employees to which by far the great majority of such employees belong in Sweden. The applicant

<sup>1</sup> Although it might be possible to infer some oblique treatment of the matter from one or two sentences in its judgment (see, e.g., the extract from para. 39 quoted above), the *Swedish Engine Drivers' Union* case and the *Schmidt and Dahlström* cases (Cases Nos. 2 and 3 below) suggest otherwise.

<sup>2</sup> Cf., on this point, the note to the *Golder* case, this *Year Book*, 47 (1974-75), p. 319.

<sup>3</sup> See Kahn-Freund, 'Labour Relations and International Standards: Some Reflections on the European Social Charter', in *Miscellanea Ganshof Van der Meersch*, vol. 1 (1972), p. 131, at pp. 134-5.

<sup>4</sup> A. 5614/72. Decision as to admissibility: *Yearbook of the European Convention on Human Rights*, 15 (1972), p. 594. Report of the Commission adopted on 27 May 1974. *E.C.H.R.*, Judgment of 6 February, 1976. French text authentic. The Court was composed as follows: Balladore Pallieri (President); Mosler, Cremona, Wiarda, O'Donoghue, Pedersen and Petráň (judges).



trade union was one of a number of small independent trade unions for State employees. In accordance with its policy of simplifying collective bargaining, the Swedish National Collective Bargaining Office (*Statens Avtalsverk*), acting for the State, refused to make collective agreements with the applicant governing the terms of employment and conditions of work of its members. As a general rule, it made collective agreements concerning State employees only with the big three federations. These agreements were then extended to the members of the independent trade unions. The applicant alleged in this case that the refusal of the Office to enter into collective agreements with it had affected its membership and was a breach of Article 11 by itself and of Article 11 read in conjunction with Article 14. The Commission unanimously found against the applicant in respect of both allegations but referred the case to the Court.

The Court unanimously confirmed the Commission's findings. The first question which arose was whether Article 11 controlled the State when it was acting as employer, as it was here through the National Collective Bargaining Office, or whether it only applied when it was acting *qua* State. The Court avoided the issue by relying upon the wording of Article 11 (2) *in fine* which made it clear that Article 11 applied to the regulation by the State of its employees, whatever the theoretical basis. The Court stressed that it was leaving open the more general question whether Article 11 applied to relations between *private* employers and employees.

Following the interpretation of Article 11 which the full Court had adopted in the *National Union of Belgian Police* case,<sup>1</sup> the Court then ruled that the failure of the National Collective Bargaining Office to make collective agreements with the applicant was not a breach of Article 11. As in the case of the right to be consulted, the right of a trade union to conclude collective agreements with the State on behalf of its members was not expressly mentioned in Article 11 and was not to be implied. It was not in itself a necessary condition of effective trade union action for its members and the provision of it was just one of several ways in which a contracting party could satisfy its obligation to ensure that a trade union was in a position to be heard in the prosecution of its members' interests. In this case also the European Social Charter was in point. Article 6 (2) of the Charter did no more than require its contracting parties to 'promote' collective bargaining 'with a view to' the making of collective agreements. It thus recognized the essentially voluntary nature of collective bargaining and of the making of collective agreements. The question was, therefore, as it had been in the *National Union of Belgian Police* case, whether the applicant union was in fact able to present its members' position effectively and, as in that case, this test was satisfied:

No one disputes the fact that the applicant union can engage in various kinds of activity vis-à-vis the Government. It is open to it, for instance, to present claims, to make representations for the protection of the interests of its members or certain of them, and to negotiate with the Office. Nor does the applicant union in any way allege that the steps it takes are ignored by the Government. In these circumstances and in the light of the two foregoing paragraphs, the fact alone that the Office has in principle refused during the past few years to enter into collective agreements with the applicant union does not constitute a breach of Article 11 §1 considered on its own.<sup>2</sup>

The Court then applied the approach it had followed in the *National Union of Belgian Police* case to the claim concerning Article 11 read with Article 14 and again found no violation. The reason for the State's policy was the need to avoid 'being faced with an excessive number of negotiating partners, in order to avoid dissipating its

<sup>1</sup> See Case No. 1 above.

<sup>2</sup> Judgment, para. 41.

efforts and to arrive more easily at a concrete result'.<sup>1</sup> In the context of the 'high degree of centralisation achieved within the Swedish trade union movement', this was a legitimate purpose and the consequences for the applicant were not such as to infringe the principle of proportionality.

The Court's judgment in this case followed the pattern set by it in the *National Union of Belgian Police* case and, as in that case, the decision that there was no breach of the Convention on the facts can have been no great surprise. On the question what circumstances will amount to a breach of the obligation to ensure that a trade union is heard adequately in the pursuit of its members' interests, it is noticeable that the Court stressed that the case did not concern the right of trade unions to engage in collective bargaining and the legal capacity to conclude collective agreements, which the majority of the Commission had thought to be protected. The case concerned only the 'right' to insist that a collective agreement be made in a case where there is agreement on the substantive issues involved. It will be interesting to see what the Court will decide in a case involving the refusal to recognize negotiating rights.

The main question which the Commission wanted the Court to decide in the case was left open. Hiding behind the wording of Article 11 (2), the Court avoided consideration of the question whether Article 11 applies to labour relations generally—and particularly those between private employers and employees—so that the State is placed under a positive obligation to act to ensure that such relations do not violate Article 11. This is a vitally important question in respect of both the organizational and functional aspects of the right to form and join a trade union and needs early resolution. The relevant I.L.O. Convention<sup>2</sup> clearly imposes such a positive obligation and Articles 5 and 6 of the European Social Charter have been understood in this way also.<sup>3</sup> One would hope for a similar conclusion in the case of the Convention.

*Right to form and join a trade union (Article 11)—application of Article 11 to the State qua employer—no right that benefits resulting from a collective agreement negotiated by a trade union be made retroactive—failure to make them retroactive because of strike action not a violation of any right to strike that Article 11 might contain—application of Article 14*

*Case No. 3. Schmidt and Dahlström case.*<sup>4</sup> The two applicants in this case, which was referred to the Court by the Commission, were Swedish nationals who were members of one of the big three trade union confederations for State employees referred to in the previous case note. Folke Schmidt was a professor of law at the University of Stockholm and a member of the Swedish Confederation of Professional Associations (*Sveriges Akademikers Central-Organisation*). Hans Dahlström was an officer in the Swedish army and a member of the National Confederation of State Employees (*Stats tjänstemännens Riksförbund*). In the course of negotiations for a new collective agreement, the applicants' unions conducted selective strikes. These did not involve the applicants who were not called upon to strike. When the collective agreement was eventually made, the new agreed rates of pay were not made retroactive for members of the belligerent unions, whether they had gone on strike or not. They were made retroactive

<sup>1</sup> Ibid., para. 46.

<sup>2</sup> I.L.O. Right to Organize and Collective Bargaining Convention 1949 (No. 98).

<sup>3</sup> Committee of Independent Experts, *Conclusions*, vol. I, p. 31.

<sup>4</sup> A. 5589/72. Decision as to admissibility: *Yearbook of the European Convention on Human Rights*, 15 (1972), p. 576. Report of the Commission adopted on 17 July 1974. *E.C.H.R.*, Judgment of 6 February 1976. French text authentic. The Court was composed of the same Chamber of judges as that which heard the *Swedish Engine Drivers' Union* case: see above, p. 377 n. 4.



for members of other unions which had not participated in the strikes. The applicants alleged that these circumstances amounted to a violation of their rights under Article 11 and under Article 11 read with Article 14. The Commission ruled against them in respect of both allegations. It found against them by 9 to 1, with one abstention, in respect of Article 11 read by itself and by 8 to 1, with two abstentions, in respect of Articles 11 and 14.

The Court unanimously confirmed the Commission's findings. As in the *Swedish Engine Drivers' Union* case, the Court held that Article 11 applied to the regulation by the State of its employees because of the wording of Article 11 (2). Following the approach it had adopted in the *National Union of Belgian Police* case, it found that the right in question—the right to the retroactive payment of benefits resulting from a new collective agreement—could not itself be implied from Article 11. It then considered the applicants' argument that the refusal to make the agreement retroactive for members of the 'belligerent' unions was an interference with the right to strike which, it claimed, was protected by Article 11. The Court rejected this contention in the following important passage:

The Court recalls that the Convention safeguards freedom to protect the occupational interests of trade union members by trade union action, the conduct and development of which the Contracting States must both permit and make possible (*National Union of Belgian Police* judgment, 27 October 1975, Series A no. 19 p. 18, para. 39). Article 11 para. 1 nevertheless leaves each State a free choice of the means to be used towards this end. The grant of a right to strike represents without any doubt one of the most important of these means, but there are others. Such a right, which is not expressly enshrined in Article 11, may be subject under national law to regulation of a kind that limits its exercise in certain instances. The Social Charter of 18 October 1961 only guarantees the right to strike subject to such regulation, as well as to 'further restrictions' compatible with its Article 31, while at the same time recognising for employers too the right to resort to collective action (Article 6 paragraph 4 and Appendix). For its part, the 1950 Convention requires that under national law trade unionists should be enabled, in conditions not at variance with Article 11, to strive through the medium of their organisations for the protection of their occupational interests. Examination of the file in this case does not disclose that the applicants have been deprived of this capacity.<sup>1</sup>

On the allegation of a breach of Articles 11 and 14, the Court again followed the approach adopted by the full Court in the *National Union of Belgian Police* case. The decision not to make the pay awards retroactive for members of the striking unions undoubtedly placed them at a disadvantage in relation to members of other unions and non union members, and this might seem particularly unjust in the case of members of the striking unions such as the applicants who did not actually strike. The decision was based upon the principle 'traditional in Sweden' according to which 'a strike destroys retroactivity'.<sup>2</sup> Without investigating the principle further, the Court ruled that it deemed its application to be 'legitimate', i.e. to be based upon an acceptable public purpose. Moreover, as far as the particular cases of the applicants were concerned, it considered that the solidarity that prevailed among members of a union meant that it was reasonable to treat striking and non-striking members alike. Looking then at the hardship suffered by the applicants, the Court ruled that the 'principle of proportionality' had not been infringed.

As in the *Swedish Engine Drivers' Union* case, the Court left open the question whether Article 6 applies to private employer-employee relations. The interesting

<sup>1</sup> Judgment, para. 36.

<sup>2</sup> Ibid., para. 40.



feature of the case is the reference in the passage quoted above to the right to strike. The reference is equivocal, but it may well be that in a case in which it were more seriously impeded the Court would be prepared to find a violation of the Charter. It might do so either on the basis that the right to strike is itself protected or, more probably, because there is a right to take collective action to be inferred from Article 11 and, in the circumstances of the case, the absence of the right to strike was a sufficiently serious inroad upon that right to amount to a denial of it.

*Right to freedom of expression (Article 10)—restrictions ‘necessary in a democratic society . . . for the protection of morals’—the ‘margin of appreciation’ doctrine—right to the peaceful enjoyment of possessions (Article 1, 1st Protocol)—limits only the taking of ownership of property—the power to control the use of property a subjective one—application of Articles 14 and 18*

*Case No. 4. The Handyside case.*<sup>1</sup> The applicant was a publisher in the United Kingdom. His publications included works of a revolutionary, political character and the book which was the subject of this case, *The Little Red Schoolbook*. The *Schoolbook* was by two Danish authors and had been published in translation or was available in most West European countries. It was advertised widely in the United Kingdom by the applicant and aimed at schools and schoolchildren. It cost 30 pence and had chapters on education, learning, teachers, pupils, and ‘the system’. The Chapter on pupils had a 26-page section (about 13 per cent of the whole book) on sex. This section included sub-sections dealing with masturbation, orgasm, intercourse and petting, homosexuality, and abortion. The book was the subject of comment and criticism in the British press. Upon receipt of a number of complaints, the D.P.P. asked the Metropolitan Police to look into the matter and approximately 1,200 copies and the matrix were seized from the applicant’s premises by warrant under the Obscene Publications Act 1959. This left approximately 18,800 copies which were sold in due course. The applicant was charged and convicted by the Lambeth Magistrates of having in his possession obscene articles for gain contrary to the Obscene Publications Acts 1959 and 1964. He was fined £50 and ordered to pay costs.<sup>2</sup> A forfeiture order was made and the seized books were destroyed. An appeal from the Magistrates to the Inner London Quarter Sessions was unsuccessful. The applicant did not appeal further to the Court of Appeal because he accepted that the law had been correctly applied. The applicant claimed that these circumstances gave rise, *inter alia*, to a breach of Article 10 of the Convention and Article 1 of the 1st Protocol. The Commission found against the applicant in respect of both claims—by 8 to 5, with 1 abstention, in the case of Article 10, and, by 11 to 2, with one abstention (provisional seizure), and 9 to 4, with one abstention (forfeiture), in the case of Article 1, 1st Protocol. The case was referred to the Court by the Commission.

The Court held, by 13 to 1, that there was no violation of Article 10. There was no doubt that there were on the facts interferences by public authorities with the applicant’s freedom of expression in the sense of Article 10 (1). The question was whether they were justifiable under Article 10 (2) as being ‘prescribed by law and . . . necessary in a democratic society . . . for the protection of morals’. They were undoubtedly

<sup>1</sup> A. 5493/72. Decision as to admissibility: *Yearbook of the European Convention on Human Rights*, 17 (1974), p. 229. Report of the Commission adopted on 30 September 1975. *E.C.H.R.*, Judgment of 7 December 1976. French text authentic. The case was heard by the plenary court: Rule 48, Rules of Court.

<sup>2</sup> These eventually totalled about £1,000.

'prescribed by law' in the Obscene Publications Acts 1959 and 1964 and these statutes could properly be seen as aimed at the 'protection of morals'. The difficulty was to know whether the action taken under them in the applicant's case involved restrictions or penalties which were 'necessary in a democratic society' to achieve the legitimate aim of the law.

In tackling this question, the Court applied the 'margin of appreciation' doctrine. The Court's function was not, as the minority of the Commission had contended, to apply Article 10 directly to the *Schoolbook* without regard to the judgment of the Inner London Quarter Sessions. It was instead, as the majority of the Commission had determined, to review the application of the Obscene Publications Acts to the facts of the applicant's case and to do so on the basis that the national authorities should be left a certain amount of discretion in determining what restrictions or penalties were justifiable in their particular democratic society. The 'margin of appreciation' doctrine applied and did so for the following reasons:

... it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them ... it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of 'necessity' in this context.<sup>1</sup>

With the 'margin of appreciation' doctrine in mind, the Court examined in detail 'the individual decisions complained of, in particular, the judgment of the Inner London Quarter Sessions'.<sup>2</sup> This had, the Court found, the legitimate aim of the 'protection of morals'. In particular, the Court rejected the applicant's argument that the action taken against him had been politically motivated; it was not part of a campaign 'to muzzle a small-scale publisher whose political leanings met with the disapproval of a fragment of public opinion'<sup>3</sup> as he had contended.

The Court found that the action taken could also be said to be 'necessary in a democratic society'. In doing so, it rejected a series of arguments by the applicant to the contrary. The absence of prosecutions in other parts of the United Kingdom in respect of the many copies not seized, the failure to prosecute other persons in respect of hard core pornography, and the absence of prosecutions in the majority of other member-States of the Council of Europe in respect of the *Schoolbook* were all facts that did not invalidate the action taken against the applicant in view of the discretion given to the United Kingdom authorities under the 'margin of appreciation' doctrine.

In rejecting the applicant's arguments, the Court adopted the following approach to the meaning of the word 'necessary':

... whilst the adjective 'necessary', within the meaning of Article 10, paragraph 2, is not synonymous with 'indispensable' (cf., in Articles 2, paragraph 2 and 6, paragraph 1, the words 'absolutely necessary' and 'strictly necessary' and, in Article 15, paragraph 1, the phrase 'to the extent strictly required by the exigencies of the situation') neither has it the flexibility of such expressions as 'admissible', 'ordinary' (cf. Article 4, paragraph 3), 'useful' (cf. the French text of the first paragraph of Article 1 of Protocol No. 1), 'reasonable' (cf. Articles 5, paragraph 3 and 6, paragraph 1) or 'desirable' ...<sup>3</sup>

<sup>1</sup> Judgment, para. 48.

<sup>2</sup> Ibid., para. 51.

<sup>3</sup> Ibid., para. 52.



It also emphasised that the 'margin of appreciation' doctrine is to be applied by reference to national circumstances. Although all of the contracting parties are, as members of the Council of Europe, to be taken to be 'democratic' in the sense of Article 10 (2), the fact that the *Schoolbook* had circulated freely in most of them did not mean that any one of them might not properly decide that its non-distribution was not 'necessary' in its particular circumstances. Finally, the Court rejected an argument that the action taken against the applicant infringed the principle of proportionality inherent in the concept of 'necessary'. It was not, the applicant had argued, 'necessary' to go to the lengths to which the State had gone in the case to deal with the threat to morality posed by the *Schoolbook*. In particular, the expurgation of the offending passages or restrictions on sale and advertising were mentioned as measures that would have been sufficient. The Court rejected the possibility of expurgation because of the element of censorship that it involved and did not consider that the second suggestion would have worked.

Judge Mosler dissented from the Court's judgment in respect of Article 10. He did so on the ground that the steps taken against the applicant were not 'necessary' because they 'were not appropriate with regard to the aim pursued'.<sup>1</sup> This was so because they affected only about 10 per cent of the copies of the book printed.

The Court unanimously rejected the claim under Article 1 of the 1st Protocol. The applicant complained of the seizure of copies of the *Schoolbook* and of the matrix and of the forfeiture order which followed his conviction. The seizure was not a violation of the first paragraph of Article 1 because it was not a taking of ownership, which only occurred upon the making of the forfeiture order. Until that time the seizure was only one of possession, to which the first paragraph of Article 1 did not extend, as the *travaux préparatoires* made clear. The second paragraph of Article 1 *did* apply because there was control of 'the use of property' by the seizure order. But paragraph 2 of Article 1 of the 1st Protocol contrasted with Article 10 of the Convention in that it confirmed the right of the State to 'enforce such laws as it deems necessary' to control the use of property. It was not open to the Court, therefore, as it was under Article 10 (2) (where the word 'necessary' was not so qualified) to question a State's decision that control was 'necessary'. The Court's role was instead limited 'to supervising the lawfulness and the purpose of the restriction in question'.<sup>2</sup> Acting in this capacity, the Court found that the seizure was lawful and was 'in accordance with the general interest' as being for the 'protection of morals'. The forfeiture following conviction did come within the first paragraph of Article 1, because it deprived the applicant of ownership. It was nonetheless justifiable 'in the light of the principle of law, common to the Contracting States, whereunder items whose use has been lawfully adjudged illicit and dangerous to the general interest are forfeited with a view to destruction'.<sup>3</sup>

The Court also considered whether there had been violations of Article 14 (as read with Article 10) or 18 and held unanimously in each case that there had not. As far as Article 14 was concerned, the Court did not consider that the applicant had suffered because of his political views, or that there had been discrimination in the differences between the treatment afforded to the *Schoolbook* and to other pornographic literature (bearing in mind that the former was aimed at schoolchildren), or that the measures taken against the applicant had in any other way deviated from those in other comparable cases so as to amount to a 'denial of justice' or a 'manifest abuse' in the sense of the *Engel* case.<sup>4</sup>

<sup>1</sup> Ibid., pp. 27-8.

<sup>2</sup> Ibid., para. 62.

<sup>3</sup> Ibid., para. 63.

<sup>4</sup> See Case No. 6, below.



The case is of importance mainly because of the full consideration given to the application of Article 10 (2), which has its counterpart in several other provisions of the Convention. The Court's use of the 'margin of appreciation' doctrine in this context is consistent with its earlier judgment in the *Golder* case and does not call for criticism. The explanation of the meaning of 'necessary' is new and, although leading to a meaning which is hard to define and not as strict as that which a dictionary definition would suggest, it is probably in keeping with what can reasonably be expected of the contracting parties. A stricter test would have presented serious difficulties on the facts of a case which was typical of many which go forward under the United Kingdom legislation on obscenity, which has many defects but is not so illiberal that one would want to see it struck down. The more generous test adopted may, in fact, add little to the dispensation that is allowable anyway under the 'margin of appreciation' doctrine, especially since the contracting party will still have to bring the purpose of the action which it takes within one of the headings listed (the 'protection of morals', etc.). Another interesting feature of the Court's judgment is its acceptance of the absence of a European standard of public morality. This was an inevitable conclusion for a group of States with such disparate moral standards as the Mediterranean and Scandinavian countries and presents an interesting comparison with the position in the United States, where the Supreme Court, after applying a national standard for a decade or so, has now adopted an approach to the definition of obscenity which applies local community standards.<sup>1</sup>

An interesting feature of the Court's consideration of the claim under Article 14 is that this claim had been rejected by the Commission at the admissibility stage. Following the approach to its relationship with the Commission which the Court had adopted in the *Vagrancy* cases,<sup>2</sup> the Court held that it was competent to consider the allegation under Article 14 despite this rejection, since the facts upon which it was based were no different from those that formed the subject of the claims which had been admitted and which therefore had been established by the Commission in its examination of the case. The Court thus confirmed that it may consider a question of law raised in the rejected part of an application that is partially admitted and partially rejected at the admissibility stage.<sup>3</sup>

*Right to education (Article 2, 1st Protocol)—the State may make sex education compulsory in State schools—application of Article 14—right to respect for family life (Article 8)—freedom of thought, conscience, and religion (Article 9)*

*Case No. 5. Danish Sex Education case (Kjeldsen, Busk Madsen and Pedersen cases).*<sup>4</sup> The applicants in this case were three married couples of Danish nationality. They all had children of school age and claimed that the position in Denmark under Act no. 235 of 27 May 1970 by which sex education was compulsory in Danish State schools was a breach of Article 2 of the 1st Protocol to the Convention. One couple also

<sup>1</sup> *Miller v. California*, 413 U.S. 421 (1973).

<sup>2</sup> *E.C.H.R.*, Judgment of 18 June 1971.

<sup>3</sup> See the case note in this *Year Book*, 46 (1972-73), p. 463, at pp. 468-9.

<sup>4</sup> A. 5095/71 (*Kjeldsen* case); Decision as to admissibility: *Yearbook of the European Convention on Human Rights*, 15 (1972), p. 482. A. 5926/72 (*Pedersen* case) and A. 5920/72 (*Busk Madsen* case); Decision as to Admissibility: *Yearbook of the European Convention on Human Rights*, 16 (1973), pp. 340 (partial decision) and 344 (final decision). Report of the Commission in all three cases adopted on 21 March 1975. *E.C.H.R.*, Judgment of 6 December 1976. French text authentic. The Court consisted of the following Chamber of Judges: Balladore Pallieri (President); Verdross, Zekia, Pedersen, Petráň, Ryssdal and Evrigenis (judges).

complained of a breach of Articles 8, 9, and 14. The applicants drew a distinction between sex education in a biological sense and in the sense of guidance. They did not object to the former which had been compulsory in Danish State schools before 1970. They claimed that the State was interfering with their right as parents to determine how and when their children should be counselled on sexual matters by teaching the latter in schools also. The Commission was evenly divided (7 to 7) on the question whether there was a breach of Article 2 of the 1st Protocol, and decided against the applicants on the casting vote of the President. It was unanimous in considering that there was no violation of Article 8 or 9 and reached the same conclusion in respect of Article 2 of the 1st Protocol as read with Article 14 by 7 to 4, with 3 abstentions. The Commission referred the case to the Court.

The Court held against the applicants in respect of the claim made under Article 2 of the 1st Protocol by 6 to 1. Before doing so, it rejected two important submissions made by the Danish Government. Article 2 did not apply, as Denmark had argued, only to education in *private* schools. As the *travaux préparatoires* confirmed, and the Commission had unanimously concluded, Article 2 covered 'any functions' which the State assumed in respect of education generally, 'including that consisting of the organization and financing of public education'.<sup>1</sup> In the Court's words:

The second sentence of Article 2 aims in short at safeguarding the possibility of pluralism in education which possibility is essential for the preservation of the 'democratic society' as conceived by the Convention. In view of the power of the modern State, it is above all through State teaching that this aim must be realised.<sup>1</sup>

The Court also rejected the Danish Government's argument that Article 2 applied only to religious instruction. The requirement was instead that the State 'respect parents' convictions, be they religious or philosophical, throughout the entire State education programme'.<sup>2</sup> This did not mean, however, that the State, in setting the curriculum, could not impart 'through teaching or education information or knowledge of a directly or indirectly religious or philosophical kind'.<sup>3</sup> The position was rather that the State 'must take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner'.<sup>3</sup> It 'is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions'.<sup>3</sup>

Applying this approach to the Danish sex education law, the Court noted that the programme was aimed less at giving information about sex which children could, and did, find out from other sources than 'at giving them such knowledge more correctly, precisely, objectively, and scientifically'.<sup>4</sup> In so doing, the State was, as the minority of the Commission had concluded, very likely to encroach upon matters of religion and philosophy because 'what are involved are matters where appraisals of fact easily lead on to value-judgments'.<sup>4</sup> Even so, the overall objective of the programme was not indoctrination:

Examination of the legislation in dispute establishes in fact that it in no way amounts to an attempt at indoctrination aimed at advocating a specific kind of sexual behaviour. It does not make a point of exalting sex or inciting pupils to indulge precociously in practices that are dangerous for their stability, health or future or that many parents consider reprehensible. Further, it does not affect the right of parents to enlighten and advise their children, to exercise with regard to their children natural parental functions

<sup>1</sup> Judgment, para. 50.

<sup>2</sup> Ibid., para. 51.

<sup>3</sup> Ibid., para. 53.

<sup>4</sup> Ibid., para. 54.



as educators, or to guide their children on a path in line with the parents' own religious or philosophical convictions.<sup>1</sup>

The objective was instead to warn children against developments which the Government had found disturbing, viz. 'the excessive frequency of births out of wedlock, induced abortions and venereal diseases', and to cause children 'not . . . to land themselves or others in difficulties solely on account of lack of knowledge'.<sup>1</sup> These were considerations which, although moral in quality, were 'very general in character' and did not 'entail overstepping the bounds of what a democratic state may regard as the public interest'.<sup>1</sup> There was also the important fact that Denmark did allow parents who objected to the sex education programmes in the State school system to send their children to State-subsidized private schools where sex education was not compulsory, or to educate them at home.

The Court rejected, by 6 to 1 also, the applicants' claim that Article 14 of the Convention had been violated because parents who objected to their children having religious education in State schools were allowed to have their children exempted from such education, whereas parents who objected to their children having sex education lacked a comparable opportunity. The Court considered that there was a distinction between religious and sex education in that the former *necessarily* involved the dissemination of beliefs, whereas this was not true of the latter. There was also the fact that the wording 'status' in Article 14 presupposed distinctions based upon *personal* characteristics, which was not the case here.

Judge Verdross dissented from these rulings by the Court. As far as Article 2 taken by itself was concerned, he drew a distinction between the imparting of information of a purely biological kind and the giving of information about sexual practices, such as contraception. However objectively communicated, the latter was bound to affect the development of a child's conscience and was therefore something which could violate the Christian convictions of parents. As far as Article 14 was concerned, parents whose religious and philosophical convictions were different from those of parents who could accept the Danish legislature's approach were discriminated against in having, at best, to undergo the material hardship of sending children to private schools (however heavily subsidized) or of teaching them at home.

The Court was unanimous in rejecting without argument the claims made under Articles 8 and 9.

The issue with which the Court was seized in this case had been one of considerable controversy in Denmark, as it has in other West European countries. The decision reached by the Court emphasizes the public interest in ensuring, in an age of increased sexual freedom, that children are fully aware of the consequences of their acts and is in accord with the policies adopted by most Council of Europe States on this matter. The majority in favour of this approach in the Chamber of the Court which heard this case was a clear one—much clearer than that in the Commission, which had witnessed considerable differences of opinion upon the matter.

*Application of the right to liberty of the person (Article 5) to military disciplinary proceedings—detention 'after conviction by a competent court' (Article 5 (1) (a))—detention 'to secure the fulfilment of any obligation prescribed by law' (Article 5 (1) (b))—right to a remedy to challenge the legality of detention (Article 5 (4))—the meaning of 'criminal charge' and 'civil rights and obligations' in (Article 6 (1)) as applied to military disciplinary proceedings—presumption of innocence in criminal proceedings (Article 6 (2))—right to*

<sup>1</sup> Judgment, para. 54.



*have adequate time and facilities to prepare a defence (Article 6 (3) (b))—right to legal assistance (Article 6 (3) (c))—right to examine witnesses (Article 6 (3) (d))—freedom of speech (Article 10)—restriction for the ‘prevention of disorder’ (Article 10 (2))—freedom of association (Article 11)—application of Article 14—application of Article 50.*

*Case No. 6. Engel and others case.*<sup>1</sup> The five applicants in this case—Engel, van der Wiel, de Wit, Dona and Schul—were Dutch nationals doing military service in various non-commissioned ranks of the Netherlands armed forces. Their applications concerned the procedures that were followed in military disciplinary proceedings against them which they claimed were in breach of Articles 5 and 6. Other related allegations concerned Articles 10 and 11. Under Dutch law a soldier may be prosecuted for offences against military discipline. Some of the more serious of these are punishable also as criminal offences under the Military Penal Code; most of them are just disciplinary offences. The penalties that could, at the time of these cases, be imposed for disciplinary offences included light arrest, aggravated arrest, strict arrest, and committal to a disciplinary unit. *Light arrest* involved confinement to barracks or at home during off-duty hours. *Aggravated arrest* was identical to this except that the soldier had to spend his off-duty hours in a specially designated but unlocked place. *Strict arrest* involved a soldier being locked in a cell all day and night.<sup>2</sup> *Committal to a disciplinary unit* was similar to strict arrest except that the disciplinary regime in the unit was stricter.

Military discipline is the responsibility of the soldier's commanding officer. He conducts the investigation into the case, hears the accused and other witnesses, and determines the punishment. Appeal is to a complaints officer, who is the officer next superior to the commanding officer. The complaints officer, who is usually assisted by a colleague who is a lawyer, hears the appellant and the commanding officer and such witnesses as he thinks necessary. He must give reasons for his decision. Appeal from the complaints officer is to the Supreme Military Court. This is composed of two judges from the ordinary courts, one of whom acts as the president, and four military officers. The military members are appointed and may be dismissed at the pleasure of the court. They are normally in their last appointment at the end of their service in the armed forces. They are not accountable to a higher officer for their decisions. They take an oath to be just, honest and impartial. The court has power to review the facts and the law. It may not increase a penalty. Whereas it hears criminal cases under the Military Penal Code in public, it hears disciplinary appeals in private.

Engel, a sergeant, was punished with 4 days' light arrest by his commanding officer for being absent from his home without leave. He had been absent in order to attend a meeting of the V.V.D.M. (a conscript servicemen's association) at which he was elected vice-president. He was later punished with 3 days' aggravated arrest for disregarding his first punishment. When he disregarded this second punishment also, he was arrested by the military police and provisionally detained in strict arrest for about two days, after which time he was sentenced to 3 days' strict arrest by his commanding officer for disregarding his two previous punishments. Engel appealed to the

<sup>1</sup> A.5100/71 (*Engel case*), A.5101/71 (*van der Wiel case*), A.5102/71 (*de Wit case*), A.5354/72 (*Dona case*) and A.5370/72 (*Schul case*). Decision as to admissibility in all five cases: *Yearbook of the European Convention on Human Rights*, 15 (1972) p. 508. Report of the Commission adopted on 19 July 1974. *E.C.H.R.*, Judgment of 8 June 1976. French text authentic. The case was heard by the plenary court: Rule 48, Rules of Court.

<sup>2</sup> This punishment, which could only be imposed on non-commissioned officers and ordinary servicemen, was abolished in 1974.

complaints officer who reduced all three punishments. The last punishment of strict arrest was reduced to two days' strict arrest and deemed to have been served by the two days of his provisional arrest. Engel appealed unsuccessfully to the Military Supreme Court against the complaints officer's decision. Altogether, he spent just the two days of provisional arrest in detention.

Van der Wiel, a corporal, was punished with 4 days' light arrest for being late for duty and absent without leave. The punishment was sustained on appeal by the complaints officer and the Supreme Military Court.

De Wit, a private, was punished with committal to a disciplinary unit for 3 months for driving a jeep irresponsibly, and for other misconduct. He appealed unsuccessfully to the complaints officer, but his punishment was reduced to 12 days' aggravated arrest by the Supreme Military Court. The punishment of 3 months' detention had been suspended pending appeal so that he served just the 12 days' aggravated arrest and served it after the decision of the Supreme Military Court.

Dona and Schul, who were privates, were editors of *Alarm*, a stencilled periodical which was circulated within their barracks. One issue of it was banned and the applicants were sentenced to 3 and 4 months' committal to a disciplinary unit for having taken part in the publication and distribution of a writing tending to undermine discipline. When the applicants refused to give an undertaking about future publications, they were placed under aggravated arrest. The complaints officer rejected their appeals and confirmed the order for their interim custody in the form of aggravated arrest. The Military Supreme Court agreed to their release pending their appeals to it subject to certain undertakings which the applicants gave. The Court later confirmed both punishments of committal to a disciplinary unit except that Schul's committal was reduced to 3 months. The two applicants were accordingly sent to a disciplinary unit after the Court's ruling to serve their 3 months' sentence.

The first question which was raised under Article 5 was whether any of the applicants had been 'deprived of his liberty'. In answering this question, the Court noted that the 'right to liberty' in Article 5 concerned 'individual liberty in its classic sense, that is to say the physical liberty of the person'.<sup>1</sup> It was *not* concerned with mere restrictions upon liberty of movement, which came within Article 2 of the 4th Protocol. The Court confirmed also that punishments imposed in the course of military discipline came within Article 5, although the 'bounds that Article 5 requires the State not to exceed are not identical for servicemen and civilians'.<sup>2</sup> States were allowed a certain margin of appreciation in respect of the former:

A disciplinary penalty or measure which on analysis would unquestionably be deemed a deprivation of liberty were it to be applied to a civilian may not possess this characteristic when imposed upon a serviceman. Nevertheless, such penalty or measure does not escape the terms of Article 5 when it takes the form of restrictions that clearly deviate from the normal conditions of life within the armed forces of the Contracting States. In order to establish whether this is so, account should be taken of a whole range of factors such as the nature, duration, effects and manner of execution of the penalty or measure in question.<sup>2</sup>

Looking at the punishments that could be imposed under Dutch military disciplinary law, the Court ruled that light and aggravated arrest were not deprivations of liberty in the sense of Article 5, but that strict arrest and committal to a disciplinary unit were. The crucial consideration was that, although confined in his movements, a

<sup>1</sup> Judgment, para. 58.

<sup>2</sup> Ibid., para. 59.



soldier was not locked up in cases of light and aggravated arrest; in the case of strict arrest and committal to a disciplinary unit he was.

Consequently, in the cases before the Court, only the strict arrest of Engel and the committal to a disciplinary unit of Dona and Schul were subject to Article 5.<sup>1</sup>

The Court held, by 9 to 4,<sup>2</sup> that the strict arrest of Engel infringed Article 5 as not coming within any of the cases in which detention was permitted by it. It did not come within Article 5 (1) (a) because it did not occur '*after conviction by a competent court*' (italics added), the commanding officer and the military police not constituting such a 'court'.<sup>3</sup> Nor was it justified, as the Netherlands had argued, under Article 5 (1) (b):

The Court considers that the words 'secure the fulfilment of any obligation prescribed by law' concern only cases where the law permits the detention of a person to compel him to fulfil a specific and concrete obligation which he has until then failed to satisfy. A wide interpretation would entail consequences incompatible with the notion of the rule of law from which the whole Convention draws its inspiration (Golder judgment of 21 February 1975, Series A. no. 18, pp. 16-17, para. 34). It would justify, for example, administrative internment meant to compel a citizen to discharge, in relation to any point whatever, his general duty of obedience to the law.

In fact, Mr. Engel's provisional arrest was in no way designed to secure the fulfilment in the future of such an obligation. Article 44 of the 1903 Act, applicable when an officer has 'sufficient indication to suppose that a subordinate has committed a serious offence against military discipline', refers to past behaviour. The measure thereby authorised is a preparatory stage of military disciplinary proceedings and is thus situated in a punitive context. Perhaps this measure also has on occasions the incidental object or effect of inducing a member of the armed forces to comply henceforth with his obligations, but only with great contrivance can it be brought under sub-paragraph (b). If the latter were the case, this sub-paragraph could moreover be extended to punishments *stricto sensu* involving deprivation of liberty on the ground of their deterrent qualities. This would deprive such punishments of the fundamental guarantees of sub-paragraph (a).

The said measure really more resembles that spoken of in sub-paragraph (c) of Article 5 para. 1 of the Convention. However in the present case it did not fulfil one of the requirements of that provision since the detention of Mr. Engel from 20 to 22 March 1971 had not been 'effected for the purpose of bringing him before the competent legal authority' (paragraphs 86-88 of the report of the Commission).<sup>4</sup>

The Court held, by 10 to 3,<sup>5</sup> that Engel's detention was also in breach of Article 5 for the quite separate reason that it was not 'prescribed by law'. Dutch law did not allow his provisional detention for more than 24 hours so that his detention beyond that period, for a further 22 to 30 hours, was a violation of Article 5 and remained so even though the period of his provisional arrest had later been counted as his confirmed punishment of strict arrest.<sup>6</sup>

In contrast, the Court held, by 11 to 2,<sup>7</sup> that the committal of Dona and Schul to

<sup>1</sup> The Court was unanimous in holding that Article 5 was not applicable to the light arrest of Engel and of van der Wiel and held by 12 to 1 (Judge Zekia dissenting) that it was also not applicable to the aggravated arrest of de Wit, or to the interim aggravated arrest of Dona and Schul.

<sup>2</sup> See the following two notes for the identity of the dissenting judges.

<sup>3</sup> Judge Bindshedler-Robert dissented on this point.

<sup>4</sup> Ibid., para. 69. Judges O'Donoghue, Pedersen and Vilhjalmsen dissented on this point.

<sup>5</sup> Judges O'Donoghue, Pedersen, and Bindshedler-Robert dissented.

<sup>6</sup> Cf. *Neumeister* case, *E.C.H.R.*, Judgment of 7 May 1974, paras. 40-1.

<sup>7</sup> Judges Vilhjalmsen and Evrigenis dissented.



a disciplinary unit was not a violation of Article 5 (1). It emphasized that this punishment (in contrast with the aggravated arrest of these two applicants for failure to give certain undertakings pending appeal which did *not* qualify under Article 5 as a deprivation of liberty) was suspended until after the decision on appeal by the Supreme Military Court. This Court was a 'court' in the sense of Article 5 (1) (a) so that the detention of the applicants 'after' their 'conviction' by it was permissible under Article 5 (1) (a). On the status of the Supreme Military Court, the Court noted that although its military members were not irremovable in law, in practice they, like the civilian members, enjoyed the necessary independence. In addition, it did not appear from the file that the procedure followed by the Court was such as to fail to give the applicants 'the benefit of adequate judicial guarantees under Article 5 (1) (a), an autonomous provision whose requirements are not always co-extensive with those of Article 6'.<sup>1</sup> The Court's decision could be considered as a 'conviction' because Article 5 (1) (a) applied 'to any "conviction" occasioning deprivation of liberty pronounced by a "court", whether the conviction be classified as criminal or disciplinary by the internal law of the state in question'.<sup>1</sup>

The Court held unanimously<sup>2</sup> that in the case of none of the applicants was there a violation of Article 5 read with Article 14. In the cases where there had been no violation of Article 5 because no deprivation of liberty had occurred, Article 14 did not apply because the 'enjoyment of a right set forth' was not in issue. As far as the cases that came within Article 5 in the above sense were concerned, the applicants complained of the differences in punishments that existed according to rank<sup>3</sup> and the differences in treatment in disciplinary matters of servicemen and civilians. The Court took the view that both kinds of distinction could be justified in terms of the legitimacy of their aim and the principle of proportionality. The Court paid particular attention to the purpose behind the differences in punishment based upon rank. It noted that 'the respective legislation of a number of Contracting States seems to be evolving, albeit in various degrees, towards greater equality in the disciplinary sphere between officers, non-commissioned officers and ordinary servicemen'.<sup>4</sup> It considered, however, that for the time being at least such distinctions as the applicants had called in question could be justified:

The hierarchical structure inherent in armies entails differentiation according to rank. Corresponding to the various ranks are differing responsibilities which in their turn justify certain inequalities of treatment in the disciplinary sphere. Such inequalities are traditionally encountered in the Contracting States and are tolerated by international humanitarian law (paragraph 140 of the Commission's report: Article 88 of the Geneva Convention of 12 August 1949 relative to the Treatment of Prisoners of War). In this respect, the European Convention allows the competent national authorities a considerable margin of appreciation.

At the time in question, the distinctions attacked by the three applicants had their equivalent in the internal legal system of practically all the Contracting States. Based on an element objective in itself, that is rank, these distinctions could have been dictated by a legitimate aim, namely the preservation of discipline by methods suited to each category of servicemen. While only privates risked committal to a disciplinary unit, they clearly were not subject to a serious penalty threatening the other members of the armed

<sup>1</sup> Judgment, para. 68.

<sup>2</sup> See, however, the separate opinion of Judge Evrigenis.

<sup>3</sup> e.g., strict arrest could be served by commissioned officers at home (without being locked up) whereas non-commissioned officers and ordinary servicemen had to serve it locked in a cell.

<sup>4</sup> Judgment, para. 72.

forces, namely reduction in rank. As for confinement in a cell during strict arrest, the Netherlands legislator could have had sufficient reason for not applying this to officers.<sup>1</sup>

Finally, under Article 5, the Court held, by 12 to 1,<sup>2</sup> that there had been no breach of the obligation under Article 5 (4) to provide a remedy for persons detained by which they could challenge the legality of their detention in the case of Dona and Schul in respect of their committal to a disciplinary unit. Since the effective decision to commit them had been taken by a court at the close of judicial proceedings, the supervision required by Article 5 (4) was provided by that court—the Supreme Military Court—in its decision.<sup>3</sup>

The first question which the Court had to consider under Article 6 was whether the disciplinary proceedings against the applicants involved the determination of 'any criminal charge' against them or of their 'civil rights and obligations' so that Article 6 applied. The Court's approach<sup>4</sup> to the question whether any 'criminal charge' was being determined was first to confirm that the concept of 'criminal', like that of a 'charge' in the same phrase, was autonomous, although, in the case of 'criminal', autonomous in a special 'one way' sense only. If a State were to classify an offence as 'criminal', it would thereby be such for the purposes of Article 6. If, however, it were to classify it as a disciplinary offence, the Court might none the less, applying the autonomous Convention concept of 'criminal', decide that the charge was a 'criminal' one so that Article 6 would apply. When deciding whether a charge was a 'criminal' one for the purposes of Article 6, three considerations are relevant: (1) the classification of the offence—disciplinary or criminal—in the local law, although this is 'no more than a starting point';<sup>5</sup> (2) the nature of the offence in that if it involves 'an act or omission allegedly contravening a legal rule governing the operation of the armed forces, the State may in principle employ against him disciplinary law rather than criminal law';<sup>5</sup> and (3) the nature of the punishment. As far as the last consideration is concerned, an offence which may result in deprivation of liberty in the sense of Article 5 is to be seen as 'criminal' except in cases in which the deprivation, by its 'nature, duration or manner of execution cannot be appreciably detrimental'.<sup>5</sup>

Applying this approach to the cases of the five applicants, the Court held unanimously that van der Wiel was not subject to a 'criminal charge' because the punishment in his case did not involve a deprivation of liberty at all and, by 11 to 2,<sup>6</sup> that Engel was not subject to one either because of the shortness of the punishment of imprisonment that the Supreme Military Court could impose in his case and because, in any event, he had effectively already served it. In contrast, the charges against de Wit, Dona, and Schul 'did indeed come within the "criminal" sphere since their aim was the imposition of serious punishments involving deprivation of liberty'.<sup>7</sup> These three, therefore, were entitled to the guarantees applicable in Article 6 to criminal cases in the disciplinary proceedings to which they were subjected.

Before considering whether Article 6 was violated in respect of these three applicants, the Court noted that it was not necessary to decide whether the 'civil rights or

<sup>1</sup> Ibid.

<sup>2</sup> It is not clear who the dissenting judge was.

<sup>3</sup> Cf. the *Vagrancy* cases, *E.C.H.R.*, judgment of 18 June 1971, para. 76.

<sup>4</sup> A different approach from that of the Court is suggested by Judges O'Donoghue and Peder-sen. No vote was taken on this particular question.

<sup>5</sup> Judgment, para. 82.

<sup>6</sup> One of the dissenting judges was Judge Cremona. It is not clear who the other dissenting judge was.

<sup>7</sup> Judgment, para. 85.



obligations' of any of the applicants were in issue, as three of them had alleged. This was true of Dona and Schul because it had been held that Article 6 applied to them anyway. It was true of Engel because his argument was that his 'civil rights' of freedom of assembly and association as defined in the Convention had been infringed and this was not an argument that could succeed on the facts since all that was in issue in his case was his absence without leave and refusal to accept his punishment.

Then, applying Article 6 (1), the Court held, by 11 to 2,<sup>1</sup> that this provision had been violated in the proceedings before the Supreme Military Court in the cases of all three applicants—de Wit, Dona and Schul—because they had been conducted *in camera* when Article 6 (1) required that they be public. The Court rejected unanimously an argument by Dona and Schul that there had been a violation of the presumption of innocence protected by Article 6 (2) by the Supreme Military Court in taking into account, when determining sentence, their participation in two other publications in addition to the banned issue of *Alarm* and for the publication of which they had not been prosecuted. The Court confirmed that the presumption of innocence goes only to guilt or innocence and not to sentencing. The Court held, by 9 to 4,<sup>2</sup> that there had been no breach of Article 6 (3) (c) (right to legal assistance) in any of the three cases:

Then again, each of the three applicants has had the opportunity 'to defend himself in person' at the various stages of the proceedings. They have furthermore received the benefit before the Supreme Military Court and, in Mr. de Wit's case, before the complaints officer, of 'legal assistance of (their) own choosing', in the form of a fellow conscript who was a lawyer in civil life. Mr. Eggenkamp's services were, it is true, limited to dealing with the legal issues in dispute. In the circumstances of the case, this restriction could nonetheless be reconciled with the interests of justice since the applicants were certainly not incapable of personally providing explanations on the very simple facts of the charges levelled against them. Consequently, no interference with the right protected by sub-paragraph (c) emerges from the file in this case.<sup>3</sup>

Similarly, no breach of Article 6 (3) (d) (right to examine witnesses) had occurred:

Neither does the information obtained by the Court, in particular on the occasion of the hearings on 28 and 29 October 1975, disclose any breach of sub-paragraph (d). Notwithstanding the contrary opinion of the applicants, this provision does not require the attendance and examination of every witness on the accused's behalf. Its essential aim, as is indicated by the words 'under the same conditions', is a full 'equality of arms' in the matter. With this proviso, it leaves it to the competent national authorities to decide upon the relevance of proposed evidence insofar as is compatible with the concept of a fair trial which dominates the whole of Article 6. Article 65 of the 1903 Act and Article 56 of the 'Provisional Instructions' of 20 July 1814 place the prosecution and the defence on an equal footing: witnesses for either party are summoned only if the complaints officer or the Supreme Military Court deems it necessary. As concerns the way in which this legislation was applied in the present case, the Court notes that no hearing of witnesses against the accused occurred before the Supreme Military Court in the case of Mr. de Wit, Mr. Dona and Mr. Schul and that it does not appear from the file in the case that these applicants requested the said Court to hear witnesses on their behalf. Doubtless Mr. de Wit objects that the complaints officer heard only one of the three witnesses on

<sup>1</sup> Judges O'Donoghue and Pedersen dissented.

<sup>2</sup> Judges Zekia, Cremona, Vilhjalmsson and Evrigenis dissented.

<sup>3</sup> Judgment, para. 91.



his behalf allegedly proposed by him, but this fact in itself cannot justify the finding of a breach of Article 6 para. 3 (d).<sup>1</sup>

Finally, in respect of Article 6, the Court rejected unanimously the argument that there had been a breach of that Article read with Article 14 because of the differences in treatment of civilians and soldiers subject to criminal offences and disciplinary proceedings respectively. As the Court pointed out, disciplinary proceedings were in some respects (e.g. sentencing) preferable from the standpoint of the accused to criminal proceedings and, in any event, the distinction between the two types of cases was explicable in terms of the differences between civilian and military life.

The Court held unanimously also that there had been no breach of Article 10 in the cases of *Dona* and *Schul*. The restriction upon their publishing activities was justifiable under Article 10 (2) 'for the prevention of disorder'. The concept of 'order' included, *inter alia*, 'the order that must prevail within the confines of a specific social group' such as the armed forces in order to maintain order thereby in society at large.<sup>2</sup> In the present case, the atmosphere in the barracks in which *Alarm* was circulated had been somewhat strained and in these circumstances the Supreme Military Court 'may have had well-founded reasons for considering that they [the applicants] had attempted to undermine military discipline and that it was necessary for the prevention of disorder to impose the penalty inflicted'.<sup>3</sup>

The Court held unanimously in the case of the same two applicants that their punishment for their publishing activities did not infringe their freedom of association under Article 11. The Court found that the applicants were not punished because of their membership of V.V.D.M., as they alleged, but for their subversive use of their freedom of expression.

The Court held, by 12 to 1,<sup>4</sup> that the question of the application of Article 50 to the three cases in which it had found a violation of the Convention was not ready for decision. The question was left over for argument at a later time when the applicants, in particular, were better prepared.

The present case, which is the only one in the period under review in which the Court held that a breach of the convention had occurred, clarifies the meaning of Articles 5 and 6 in several respects. The most important decision concerns the meaning of 'criminal' in Article 6 (1). The application of that provision, with its unequivocal insistence upon a public hearing, to military (and presumably other kinds of) disciplinary proceedings could present difficulties for a number of contracting parties. Although it is understandable that the Court refrained from ruling on the argument by one of the applicants that his 'civil rights and obligations' were being determined because a right protected by the Convention was in issue, this is an argument that has appeared occasionally in the Commission's jurisprudence<sup>5</sup> and there is a need for a ruling upon it. The Court's ruling on Article 5 as read with Article 14 points once more to the question of the role of the Court in areas in which standards are changing within the contracting parties. Here the Court noted that there was a move towards ending distinctions in punishments based upon rank, but none the less sustained the Dutch system as being consistent with a practice that was still widely accepted.

<sup>1</sup> Ibid. This holding was 9 to 4 (Judges Zekia, Cremona, Vilhjalmsson and Evrigenis dissenting) in the case of *de Wit* and by 12 to 1 (Judge Evrigenis dissenting) in the case of *Dona* and *Schul*.

<sup>2</sup> Ibid., para. 98.

<sup>3</sup> Ibid., para. 101.

<sup>4</sup> It is not clear who the dissenting judge was.

<sup>5</sup> See, e.g., the *Alam and Khan* case, *Yearbook of the European Convention on Human Rights*, 10 (1967), p. 478.

## B. DECISIONS OF THE COMMITTEE OF MINISTERS

*Right to trial within a reasonable time (Article 6 (1))—the role of the Committee of Ministers*

*Case No. 1. Huber case.*<sup>1</sup> The applicant, an Austrian national, was one of several persons (including the applicant in the *Neumeister* case)<sup>2</sup> against whom criminal proceedings were brought in Austria in connection with alleged tax frauds. The tax authorities began investigating the applicant's affairs early in 1959 and handed the case over to the Public Prosecutor's Office in Vienna in the summer of that year. On 17 August 1959, at the request of that Office, the investigating judge at the Regional Criminal Court opened a preliminary investigation into the case of the applicant and a number of other suspects. The applicant was not placed under arrest at that time. He went abroad in 1960 and was extradited from Switzerland in February 1961. He remained in custody in Austria from then until 7 July 1965. The investigation into his case was closed on 4 November 1963. An indictment was served upon him on 17 March 1964. It contained ten charges. His trial began on 9 November 1964 and continued until 18 June 1965 when proceedings were suspended for further investigations to be conducted. Five of the charges in the indictment were dropped before the trial was resumed and a further, sixth charge was tried separately, with the applicant being acquitted. After the hearing of the remaining four charges had been resumed on 4 December 1967, the Court separated three of them from the fourth for consideration in subsequent proceedings. The trial on the one remaining charge was completed on 2 July 1968. The applicant was found guilty on this charge and sentenced to 3 years' severe imprisonment. The written judgment was communicated to him on 10 March 1969, whereupon he lodged a plea of nullity against his conviction and an appeal against his sentence with the Austrian Supreme Court on 24 March 1969. The appeal was unsuccessful, the Court rejecting the plea of nullity on 16 June 1971 and the appeal against sentence on 4 November 1971. On 3 May 1972, the Public Prosecutor indicated that the three charges separated from the one charge that was proceeded with during the trial hearing would not be pursued. The Vienna Regional Criminal Court took note of this decision on 26 May 1972.

The Commission admitted for consideration on the merits the applicant's allegation that he had not been tried 'within a reasonable time' as Article 6 (1) required. In its report on the case, the Commission found that Article 6 (1) began to apply from 17 August 1959, when the preliminary investigation was opened. Only then was there a 'charge' against him in the sense of Article 6 (1). The concept of a 'charge' was an autonomous, Convention one and did not refer back to the law of the State concerned. A 'charge' could be said to exist from the time that 'the situation of the person concerned has been substantially affected as a result of the suspicion against him'.<sup>3</sup> This was not a difficult test to apply where the applicant was arrested at the time that an investigation was opened against him; where, as here, this was not so, it was a matter of judgment on the facts of the case. What influenced the Commission in this case was that in the Austrian system, 'substantial enquiries against a suspect are normally carried out at an early stage by the investigating judge following the opening of the

<sup>1</sup> A. 4517/70. Decision as to admissibility: *Yearbook of the European Convention on Human Rights*, 14 (1971), pp. 548 (partial decision) and 572 (final decision). Report of the Commission adopted on 8 February 1973.

<sup>2</sup> *E.C.H.R.*, Judgment of 27 June 1968.

<sup>3</sup> Report of the Commission in the *Huber* case, para. 67.



preliminary investigations'.<sup>1</sup> The Commission found that Article 6 (1) ceased to apply on 4 November 1971 when the applicant's appeal was rejected. It was not later, when the other outstanding charges were discontinued, because the Austrian Government had announced in the course of argument before the Commission in July 1971 that proceedings on the remaining charges would be terminated when proceedings before the Supreme Court were completed. The test was, again, whether the applicant had 'ceased to be affected as a result of the charges levelled against him'.<sup>2</sup>

As a result, the period which had to be adjudged 'reasonable' or otherwise was 12 years, 2 months, and 18 days. In determining whether there had been unreasonable delay, the Commission, acting in accordance with its previous jurisprudence, looked at

- (1) the complexity of the case as a whole;
- (2) the manner in which the case has been handled by the national judicial authorities and courts; and
- (3) the applicant's own conduct.<sup>3</sup>

Although the applicant's conduct had been partly the reason for the length of time taken, there were two reasons for the delay which were to be imputed instead to the Austrian authorities:

There is, first, the fact that the investigations against the applicant had initially been conducted in respect of twelve different charges although the applicant was in the end convicted only of one count of fraud. Proceedings on the remaining charges were, after years of investigation, separated and finally dropped altogether, and . . . this situation casts doubt on the adequacy of the investigation as a whole . . . Furthermore, there was the period of over 3 years which it took to complete the judgment of the Regional Criminal Court and to obtain a decision from the Supreme Court with regard to the applicant's plea of nullity and appeal. . . .<sup>4</sup>

In consequence, the Commission concluded, by 8 to 2, the charge against the applicant had not been determined 'within a reasonable time' as required by the Convention. In reaching this conclusion, the Commission distinguished the *Neumeister* case, in which the Court had held that the proceedings concerning a person accused of the same offence as the applicant had not been in breach of Article 6. In the present case, the period to be taken into account before the trial was one and a half years longer than that in the *Neumeister* case. The timing of the present case was also such that the Commission was in the position of considering whether there had been delay at the appellate level (and it found that there was) whereas in the *Neumeister* case the trial had not been completed in the Austrian courts when the case was heard by the European Court.

The report of the Commission, with the conclusion that a breach of Article 6 had occurred, was sent to the Committee of Ministers and, no reference to the Court having been made, decided by that body on 15 April 1975.<sup>5</sup> Having heard the arguments of the Austrian government, the Committee disagreed with the Commission and determined that no breach of the Convention had occurred. The Committee's resolution reads:

Having regard to the memorandum of 1 October 1974 from the Austrian Government, where reference has been made to the judgment of the European Court in the '*Neumeister Case*', and having regard to the view of the Austrian Government expressed in the course of the proceedings under Article 32 (1) of the Convention that in view of the

<sup>1</sup> Ibid., para. 69.

<sup>2</sup> Ibid., para. 73.

<sup>3</sup> Ibid., para. 83.

<sup>4</sup> Ibid., para. 118.

<sup>5</sup> Resolution DH (75) 2.



complexity of the proceedings, of the difficulties resulting from the rogatory commissions requested from foreign countries and of the obstructive conduct of the applicant, Article 6 (1) had not been violated;

Voting in accordance with the provisions of Article 32 (1) of the Convention, but without attaining the majority of two-thirds of the members entitled to sit;

*Decides* therefore that no further action is called for in this case.

The Case is notable as illustrating fully the unsatisfactory nature of the arrangement whereby a decision in a case in the Strasbourg system may be left for final determination by the Committee of Ministers. That body is a political body composed of representatives of the member States of the Council of Europe, including the defendant State in any case arising under the Convention. That State is entitled to present its case after the Commission has completed its report and to vote in the decision which is taken. There is no hearing of the sort that one associates with a court of law and neither the Commission nor, directly or indirectly, the applicant is able to present an argument. For the Committee of Ministers to reject the considered and independent judgment of a clear majority of the Commission after a full hearing of the facts and the legal arguments of the parties is scarcely what one would hope for in the administration of an international human rights guarantee that protects the right to a fair trial.

D. J. HARRIS

# DECISIONS OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES DURING 1975-1976\*

## *Tortious liability for repealing a regulation*

*Case No. 1. Comptoir National Technique Agricole S.A. v. Commission.*<sup>1</sup> In theory the prices of products subject to the Common Agricultural Policy are supposed to be the same throughout the E.E.C. But this system worked smoothly only as long as the rate of exchange between national currencies and the unit of account used by the E.E.C. remained stable. Since 1968 there has been a growing tendency for member States to devalue or revalue their currencies or (as in the case of the United Kingdom) to abandon a fixed exchange rate altogether and to allow their currencies to float. In order to cushion the effect on national price levels of such changes in the parity of national currencies, member States whose currencies have fallen in value against the unit of account have been authorized to levy monetary compensation amounts on exports of agricultural produce to other member States and to non-member States, and to use monetary compensation amounts to subsidize imports; in the case of member States whose currencies have risen in value against the unit of account, monetary compensation amounts are levied on imports and used to subsidize exports. The system of monetary compensation amounts is supposed to be temporary, although in practice it has sometimes become semi-permanent.

Acting under powers conferred on it by Council Regulation 974/71, the Commission, by Regulation 17/72 of 31 December 1971, authorized France to pay a monetary compensation amount of 3.95 francs per 100 kilograms of colza seed exported from France to other member States or to non-member States. The Commission increased that amount with effect from 24 January 1972 to 4.75 francs by Regulation 144/72 of 21 January 1972. By Regulation 189/72 of 26 January 1972 the Commission abolished with effect from 1 February 1972 the system of monetary compensation amounts applicable to colza seed, because it considered that 'the present situation of the market is such that the application of these compensatory amounts no longer proves to be essential for avoiding disturbances to trade in the above-mentioned products'. The plaintiff company, which before 26 January 1972 had entered into contracts to sell colza seed after 1 February 1972, claimed damages for the loss which it claimed to have suffered as a result of Regulation 189/72. The Court said:

Since the disputed measure is of a legislative nature and constitutes a measure taken in the sphere of economic policy, the Community cannot be liable for any damage suffered by individuals as a consequence of that measure . . . unless a sufficiently flagrant violation of a superior rule of law for the protection of the individual has occurred.<sup>2</sup>

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<sup>1</sup> [1975] E.C.R. 533.

<sup>2</sup> This rule had been laid down by the Court in several earlier cases: *Recueil de la jurisprudence de la Cour de justice des Communautés européennes* (hereinafter *Recueil de la jurisprudence*), 17 (1971), p. 985, and 18 (1972), p. 405; [1973] E.C.R. 803, 1070, 1248; [1974] E.C.R. 675. In all of these cases it was held that the regulations in dispute did not in fact violate 'a superior rule of law for the protection of the individual'.

In this connexion the applicant contends in the first place that by abolishing the compensatory amounts by Regulation No. 189/72 the Commission has infringed basic Regulation No. 974/71 of the Council.

That regulation, it contends, while conferring on the Commission the power to ascertain that the conditions for the application of the compensatory amounts are met, does not allow it to take a decision withdrawing compensatory amounts once instituted and it requires in any event that the Commission's decision be taken on the basis of an assessment of solely monetary factors to the exclusion of economic factors which in this case the Commission has taken into consideration.

. . . Article 1 (2) of Regulation No. 974/71 [provides] that the option for member States to apply compensatory amounts may only be exercised where the monetary measures in question [i.e. alterations in exchange rates] would lead to disturbances to trade in agricultural products.

As the application of compensatory amounts is a measure of an exceptional nature, this provision must be understood as enunciating a condition not only of the introduction but also of the maintenance of compensatory amounts for a specific product.

The Commission has a large area of discretion for judging whether the monetary measures concerned might lead to disturbances to trade in the product in question.

In order to judge the risk of such disturbances, it is permissible for the Commission to take into account market conditions as well as monetary factors.

It has not been established that the Commission exceeded the limits of its power thus defined when it considered towards the end of January 1972 that the situation on the market in colza and rape seeds was such that the application of compensatory amounts for those products was no longer necessary.

...

Regulation No. 189/72 cannot therefore be considered to be illegal in the light of . . . Regulation No. 974/71.

The Commission did not have a discretionary power in the sense that it was free to choose whether or not to suspend the system of compensatory amounts; the Court held that the Commission was obliged to suspend that system when the danger of disturbances to trade had passed. But the Commission did have a discretionary power to characterize the jurisdictional facts, i.e. to determine whether there was a danger of disturbances to trade.<sup>1</sup> In at least one previous case the Court had shown an excessive readiness to investigate this question for itself,<sup>2</sup> but it has now come to accept that the Commission's assessment of the economic situation should normally be respected by the Court. However, the Court still claims a power to intervene if the Commission exceeds its discretion or commits a patent error or a misuse of power (*détournement de pouvoir*),<sup>3</sup> e.g. if it disregards relevant factors<sup>4</sup> or takes irrelevant factors into account.<sup>5</sup>

<sup>1</sup> On the two meanings of discretionary power, see Akehurst, *The Law Governing Employment in International Organizations* (1967), pp. 115-23.

<sup>2</sup> *This Year Book*, 46 (1972-3), p. 444.

<sup>3</sup> *Schroeder v. Germany*, [1973] E.C.R. 125, 141; *Westzucker* case, [1973] E.C.R. 321; *Deuka* cases, [1975] E.C.R. 421 and 759; *Bagusat* case, [1975] E.C.R. 1339; *Balkan-Import* case, [1976] E.C.R. 19. Cf. Akehurst, op. cit. (above, n. 1), pp. 137-40 and 181-3, and Lord Mackenzie Stuart, 'The Court of Justice of the European Communities and the Control of Executive Discretion', *Journal of the Society of Public Teachers of Law*, 13 (1974), pp. 16, 22-5.

<sup>4</sup> *Commission v. Council*, [1975] E.C.R. 795, 810.

<sup>5</sup> In the present case the Court held that it was 'permissible for the Commission to take into account market conditions as well as monetary factors'. However, if Regulation 974/71 had required the Commission to base its decision solely on monetary factors, it is submitted that the Commission would have acted illegally if it had allowed itself to be influenced by other factors.



The plaintiff also contended

that the withdrawal of the compensatory amounts from 1 February 1972 violated the principle of legal certainty, on the one hand, in that it had retroactive effect and, on the other hand, in that it ignored the legitimate expectation of persons concerned that the compensatory amounts would be maintained for current transactions.

The Court said:

With regard first to the problem of retroactivity, it must be recalled that the compensatory amounts are levied on imports and granted on exports of the goods concerned and that no advance fixing of the amounts is possible.

It follows that the actual right to receive a compensatory amount on exports is only created by the performance of the export transaction and only from the moment when this takes place.

Regulation No. 189/72 of 26 January 1972, which was published in the Official Journal on 28 January and entered into force on 1 February 1972, is applied solely to exports and imports carried out from that date, whilst those carried out before that date continued to be subject to the previous rules.

The regulation does not therefore have retroactive effect in the proper sense of the expression.

The Court thus implied that the Community would have been liable if the regulation had been retroactive in the true sense of that word.<sup>1</sup>

On the issue of the plaintiff's legitimate expectation that the compensatory amounts would be maintained for current transactions, the Court said:

The Community is . . . liable if, in the absence of an overriding matter of public interest, the Commission abolished with immediate effect and without warning the application of compensatory amounts in a specific sector without adopting transitional measures which would at least permit traders either to avoid the loss which would have been suffered in the performance of export contracts [which had been concluded before the regulation was enacted but which were due to be performed after the regulation came into force] . . . or to be compensated for such loss.

In the absence of an overriding matter of public interest, the Commission has violated a superior rule of law, thus rendering the Community liable, by failing to include in Regulation No. 189/72 transitional measures for the protection of the confidence which a trader might legitimately have had in the Community rules.

After holding that the Commission was liable for losses caused by the absence of transitional provisions in Regulation 189/72, the Court adjourned the case to allow the parties to produce evidence of such losses. In a subsequent judgment the Court found, on the facts, that the plaintiff had not suffered any such losses, and therefore gave judgment for the defendant.<sup>2</sup>

The principle of liability established in this case is fairly narrow. The fact that the regulation in dispute repealed an earlier regulation was not enough on its own to make the Community liable;<sup>3</sup> what was crucial was that the repealing regulation contained no transitional provisions covering contracts which had been concluded before the repealing regulation had been enacted and which were due to be performed

<sup>1</sup> Cf. below, p. 401 n. 3.

<sup>2</sup> [1976] E.C.R. 797.

<sup>3</sup> But liability would probably have arisen if the earlier regulation had contained an express undertaking that it would not be repealed. See *Commission v. Council*, [1973] E.C.R. 575; this *Year Book*, 47 (1974-5), p. 403.

after that regulation came into force. But even this rule, narrow though it is, is subject to exceptions. For instance, if economic developments occurring before the contracts were concluded made the enactment of the repealing regulation foreseeable, the plaintiff has no remedy, because he had no legitimate expectation that the old regulation would not be repealed in the near future.<sup>1</sup> The plaintiff also has no remedy if there were strong reasons of public policy for sacrificing his interests to the public interest.<sup>2</sup> Again, if the provisions of the repealed regulation had been capable of causing the plaintiff either a profit or a loss, depending on the way the market moved between the conclusion of the contract and its performance, the plaintiff would have had no remedy; his expectation of obtaining a profit under the repealed regulation would have been too uncertain to deserve protection.<sup>3</sup>

Moreover, it is not every 'violation of a superior rule of law' which gives rise to tortious liability; such liability exists only if the violation was 'sufficiently flagrant'<sup>4</sup> and if the superior rule of law was created 'for the protection of the individual'.<sup>5</sup>

But, although the Community's liability is narrow and difficult to prove, the Community *can* be liable for enacting or repealing a regulation. It is unclear whether the circumstances which give rise to such liability also have the effect of making the regulation invalid.

The Court did not deal with this issue in the present case, and its remarks in other tort cases tend to be somewhat equivocal.<sup>6</sup> On the facts of the present case it would clearly be undesirable to treat the regulation as invalid; what was open to criticism was not the regulation as a whole, but the absence of any transitional provisions or of any warning preceding its enactment and entry into force. Because such absence caused losses for only a few people, it would clearly be better to confine them to suing in tort, and to require each plaintiff to prove that he had suffered loss as a result of the regulation, instead of treating the whole regulation as invalid *erga omnes* without proof of loss.

On the other hand, the Court held that the regulation was potentially tortious because it violated the principle of *Vertrauensschutz* (the principle that the confidence or legitimate expectations of the persons concerned deserve to be protected), which forms part of the wider principle of *Rechtssicherheit* (legal certainty or legal security).<sup>7</sup> In many non-tort cases, the Court was clearly of the opinion that alleged violations of

<sup>1</sup> *Union Nationale des Coopératives Agricoles de Céréales v. Commission and Council*, [1975] E.C.R. 1615.

<sup>2</sup> 'The Community is . . . liable if, in the absence of an overriding matter of public interest, the Commission abolished with immediate effect and without warning the application of compensatory amounts in a specific sector without adopting transitional measures . . .': [1975] E.C.R. 550 (italics added).

<sup>3</sup> *Westzucker* case, [1973] E.C.R. 723, 729-31. See also *C.A.M. v. Commission*, [1975] E.C.R. 1393, 1404-5.

<sup>4</sup> Lord Mackenzie Stuart, 'The Non-Contractual Liability of the E.E.C.', *Common Market Law Review*, 12 (1975), pp. 493, 506.

<sup>5</sup> *Ibid.*, at p. 508; *Lesieur Cotellet et Associés S.A. v. Commission*, [1976] E.C.R. 391, 411.

<sup>6</sup> See the submissions of Mr. Advocate-General Trabucchi in *Compagnie Continentale France v. Council*, [1975] E.C.R. 117, 141. In that case the Council had issued a potentially misleading statement about the content of future regulations, and tortious liability (if any) could therefore be regarded as arising less from the enactment of the regulations than from the making of the statement. In such cases there are sound policy reasons against treating the regulations as invalid, especially if the statement in dispute is made only to certain individuals and not to the public at large. The plaintiffs failed because, on the facts, they had not been misled by the statement.

See also Lord Mackenzie Stuart, *loc. cit.* (above, n. 4), pp. 508-10.

<sup>7</sup> *Westzucker* case, [1973] E.C.R. 723, 729.



the principles of *Rechtssicherheit*,<sup>1</sup> of *Vertrauensschutz*<sup>2</sup> or of non-retroactivity<sup>3</sup> (which also forms part of the wider principle of *Rechtssicherheit*)<sup>4</sup> would, if they had been proved, have resulted in the relevant regulations being invalid. Moreover, some of these cases involved facts which resembled the facts of the present case.<sup>5</sup>

Another point which is not specified in the present judgment is the *source* of the superior rule of *Vertrauensschutz*. The E.E.C. Treaty is of course superior to E.E.C. regulations,<sup>6</sup> and a Council regulation is superior to a Commission regulation based on that Council regulation. However, since the principle of *Vertrauensschutz* is not mentioned in the E.E.C. Treaty or in the relevant Council regulations, it seems most likely that the Court derived this principle from the general principles of law common to the laws of the member States.

Such general principles of law normally hold a lower position than regulations in the hierarchy of the sources of European community law; they are used to interpret and fill gaps in the regulations, but they do not override regulations. But in certain circumstances this order of preference is reversed. The Court has stated *obiter* that a decision or regulation will be invalid if it is contrary to general principles of law protecting fundamental rights. The principles have been variously described as being derived from the Constitutions of member States,<sup>7</sup> from their constitutional traditions,<sup>8</sup> or from 'international treaties for the protection of human rights on which the member States have collaborated or of which they are signatories', such as the European Convention on Human Rights.<sup>9</sup>

Why are these fundamental rights regarded as being derived only from the Constitutions or constitutional traditions of member States (or from treaties on human rights), and not from the ordinary laws of member States? The answer is probably that the Court seems to have tacitly assumed that E.E.C. regulations are equivalent to municipal Acts of Parliament, and that consequently their legality cannot be impugned by reference to the ordinary laws of member States, but only by reference to some higher law of a constitutional character. This approach obviously gives rise to problems now that the United Kingdom is a member of the Communities, because the United Kingdom has no written Constitution and therefore no entrenched fundamental rights.<sup>10</sup> It is true that the United Kingdom is rich in constitutional *traditions*, but

<sup>1</sup> *Deuka* case, [1975] E.C.R. 421, 433.

<sup>2</sup> *Commission v. Council*, [1973] E.C.R. 575 (where the Court actually annulled a regulation on this ground: see this *Year Book*, 47 (1974-5), p. 403); *Westzucker* case, [1973] E.C.R. 723, 729-31; *C.A.M. v. Commission*, [1975] E.C.R. 1393, 1404-5.

<sup>3</sup> Akehurst, *op. cit.* (above, p. 398 n. 1), pp. 240-3; *Neumann v. Hauptzollamt Hof*, [1967] E.C.R. 441, 456; *Westzucker* case, [1973] E.C.R. 321, 355.

<sup>4</sup> *Neumann v. Hauptzollamt Hof*, [1967] E.C.R. 441, 456. It follows that retroactivity does not invalidate a regulation if it does not defeat legitimate expectations: *I.R.C.A.* case, [1976] E.C.R. 1213, 1228-9, 1237.

<sup>5</sup> This is true of the *Westzucker*, *Deuka* and *C.A.M.* cases.

<sup>6</sup> E.E.C. regulations are also sometimes invalid if they conflict with rules of international law other than the E.E.C. Treaty: see this *Year Book*, 46 (1972-3), p. 445.

<sup>7</sup> *Nold v. Commission*, [1974] E.C.R. 491, 507.

<sup>8</sup> *Ibid.*; *Internationale Handelsgesellschaft* case, [1970] E.C.R. 1125, 1134.

<sup>9</sup> *Nold v. Commission*, [1974] E.C.R. 491, 507. A more accurate translation of the German text of the judgment would read: '... treaties ... in the conclusion of which member States have participated or to which they have acceded'.

<sup>10</sup> These problems arise only if a general principle of law must be *common* to the laws of the member States before it can be applied by the Court. That requirement was challenged by Mr. Advocate-General Warner in the *I.R.C.A.* case, [1976] E.C.R. 1213, 1237:

I would be inclined . . . to say that a fundamental right recognized and protected by the



they do not allow a British judge to hold an Act of Parliament invalid. Maybe it was in response to these difficulties that the Court partially changed its ground in the *Nold* case and cited treaties on human rights as an additional source of fundamental rights.<sup>1</sup> But this change of approach raises further problems; what happens, for instance, if some member States are parties to a treaty on human rights and others are not?

All these difficulties can be avoided by rejecting the tacit assumption that E.E.C. regulations are equivalent to municipal Acts of Parliament. It would be far more appropriate to equate them with *delegated* legislation; the E.E.C. Treaty delegates the power to the Council and the Commission to enact regulations, just as a British Act of Parliament delegates the power to make by-laws or statutory instruments.<sup>2</sup> Indeed, the subordinate character of the regulation in dispute in the present case is particularly striking, since the power to make it had been sub-delegated by the Council to the Commission.<sup>3</sup>

By regarding E.E.C. regulations as analogous to delegated legislation in municipal law, we increase the power of the Court to hold regulations invalid on the basis of analogies derived from municipal law, since municipal courts are generally readier to strike down delegated legislation than they are to strike down Acts of Parliament. Even English courts, which have traditionally regarded Parliament as omnipotent, have claimed and exercised the power to hold delegated legislation invalid in certain circumstances.<sup>4</sup> Whenever the courts of member States would hold a piece of delegated

Constitution of *any* member State must be recognized and protected also in Community law. The reason lies in the fact that . . . Community law owes its very existence to a partial transfer of sovereignty by each of the member States to the Community. No member State can, in my opinion, be held to have included in that transfer power for the Community to legislate in infringement of rights protected by its own Constitution. To hold otherwise would involve attributing to a member State the capacity, when ratifying the Treaty, to flout its own Constitution, which seems to me impossible.

However, Mr. Warner's views conflict with the practice followed by the Court (and by international tribunals in general) when applying general principles of law (Akehurst, *International and Comparative Law Quarterly*, 25 (1976), pp. 801, 820-3). They would lead to unworkable results if a fundamental right (e.g. freedom of the press) protected by the Constitution of one member State conflicted with a fundamental right (e.g. to privacy) protected by the Constitution of another member State—a possibility which will become increasingly likely if the number of member States continues to rise. Moreover, it is only in exceptional circumstances, which are defined in Article 46 of the Vienna Convention on the Law of Treaties and which are not applicable to the present issue, that international law regards a sovereign State's capacity to enter into a valid and binding treaty as being limited by its Constitution.

<sup>1</sup> Akehurst, *International and Comparative Law Quarterly*, 25 (1976), pp. 801, 823-4.

<sup>2</sup> Although it may be excessive to equate the Treaty with British Acts of Parliament in all respects, the Court has made it clear that an individual cannot claim compensation for losses caused by provisions of the Treaty (unlike losses caused by regulations): *Compagnie Continentale France v. Council*, [1975] E.C.R. 117, 134. This resembles the rule of English law that an individual has no legal remedy against an Act of Parliament.

<sup>3</sup> A slightly different view was taken by Mr. Advocate-General Warner in the *I.R.C.A.* case, [1976] E.C.R. 1213, 1239. He equated regulations with delegated legislation only if the regulations were enacted by the Commission under powers delegated to it by the Council. But, if 'a provision of the Treaty directly authorizes the Council or the Commission to legislate, the analogy is with a national Parliament empowered to enact Statutes'.

However, the distinction suggested by him has never been applied by the Court. Of the cases mentioned above (p. 401, nn. 1-3), some concerned Council regulations and some concerned regulations enacted by the Commission under powers delegated to it by the Council, but the Court regarded the principles of *Rechtssicherheit*, *Vertrauensschutz* and non-retroactivity as equally applicable to both types of regulation.

<sup>4</sup> It has sometimes been suggested that by-laws made by local authorities are more likely to be

legislation to be invalid (or to give rise to tortious liability) for violating a rule of municipal law, the Court of Justice of the European Communities is entitled to borrow that rule from national legal systems and to hold that E.E.C. regulations which violate that rule are invalid (or give rise to tortious liability), and it makes no difference whether that rule is derived from the Constitutions of member States or from other sources of municipal law, such as Acts of Parliament or judicial decisions.

This approach is not as incompatible with the practice of the Court of Justice of the European Communities as it might appear. It is true that in some cases the Court has tested the validity of regulations against principles derived from the Constitutions or constitutional traditions of member States, and not against principles derived from other sources of municipal law.<sup>1</sup> But in other cases the Court has said that regulations which conflict with the principles of *Rechtssicherheit*, *Vertrauensschutz* or non-retroactivity are invalid,<sup>2</sup> and that regulations which conflict with the principle of *Vertrauensschutz* give rise to tortious liability,<sup>3</sup> without saying that those principles were derived from the Constitutions or constitutional traditions of member States or from treaties on human rights.

But it is one thing for the Court to make free use of *all* relevant principles of municipal law concerning judicial review of delegated legislation, without confining its attention to Constitutions, constitutional traditions and treaties on human rights; it is another thing for the Court to disregard municipal law altogether, and to create rules which are not based on municipal analogies. In the present case (and in almost all the cases referred to in the previous paragraph) the Court made no attempt to support its views by carrying out a comparative survey of the laws of the member States.

A principle cannot be said to be 'common to the laws of the member States'<sup>4</sup> of the E.E.C. unless it exists in the laws of *all* member States.<sup>5</sup> Consequently, if it can be shown that the principle applied by the Court in the present case does not exist in English law, that principle cannot be said to be common to the laws of member States. Although English courts would probably not recognize the enactment of delegated legislation (valid or invalid) as capable of creating tortious liability,<sup>6</sup> that would not prevent the existence of a general principle of law if English courts provided the injured party with some other remedy, e.g. by treating the repealing regulation as void

held invalid by English courts than regulations and other statutory instruments made by Ministers. In *Sparks v. Edward Ash, Ltd.*, [1943] K.B. 223, 229, 230, Scott L.J. justified this distinction by referring to 'the duty of the courts to recognise and trust the discretion . . . of a minister directly responsible to Parliament, and . . . the further consideration that these regulations have to be laid on the table of both Houses [of Parliament] . . . and can be annulled in the usual way'. Since the control exercised by the European Parliament is much weaker than the control exercised by the British Parliament, review of E.E.C. regulations by the Court of Justice of the European Communities should be modelled on English courts' review of by-laws rather than on English courts' review of statutory instruments: cf. *Werhahn v. Council*, [1973] E.C.R. 1229, 1260, and *Aktien-Zuckerfabrik Schöppenstedt v. Council*, *Recueil de la jurisprudence*, 17 (1971), pp. 975, 990-1.

<sup>1</sup> See above, p. 401.

<sup>2</sup> See above, pp. 400-1.

<sup>3</sup> See *Union Nationale des Coopératives Agricoles de Céréales v. Commission and Council*, [1975] E.C.R. 1615 and *Lesieur Cotelte et Associés S.A. v. Commission*, [1976] E.C.R. 391, 411, in addition to the present case.

<sup>4</sup> Article 215 of the E.E.C. Treaty (*italics added*).

<sup>5</sup> Akehurst, *International and Comparative Law Quarterly*, 25 (1976), pp. 801, 817-23.

<sup>6</sup> This point seems to be taken for granted in England; there seems to be no express authority for the proposition in English law, although such authority does exist in Canada and the United States: *Welbridge Holdings Ltd. v. Winnipeg* (1970), 22 D.L.R. (3d) 470, 477-8, and *Dalehite v. U.S.* (1953), 346 U.S. 15, 43, 59.



and by allowing him to continue to claim rights under the previous regulation which the void regulation had purported to repeal.<sup>1</sup> But it is doubtful whether, on the facts of the present case, an English court would have treated the repealing regulation as void. *Vertrauensschutz* bears a superficial resemblance to estoppel in English law, but it is most unlikely that English courts would hold that a public authority was estopped from enacting delegated legislation; this seems to follow *a fortiori* from the rule that a public authority cannot by *contract* fetter its power to enact delegated legislation.<sup>2</sup> A slightly more promising approach would be to invoke the rule that delegated legislation is void if it is unreasonable; but this rule applies only in the most extreme cases,<sup>3</sup> and, although no case resembling the present one has so far come before an English court, it is unlikely that an English court would hold that a by-law or statutory instrument resembling Regulation 189/72 was void for unreasonableness.

### *Equal pay for men and women*

*Case No. 2. Defrenne v. Sabena.*<sup>4</sup> Miss Defrenne worked as an air hostess for the Belgian airline Sabena until she was forced to retire in 1968. Until 1966 Sabena paid air hostesses less than male cabin stewards, although both categories of workers performed identical duties. After her retirement Miss Defrenne sued Sabena in a Belgian court, claiming the difference between the salary which she had actually received in the period 1963-6 and the salary paid to male cabin stewards.

Article 119, first paragraph, of the E.E.C. Treaty provides:

Each member State shall during the first stage [of the transitional period] ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work.<sup>5</sup>

The Belgian court asked the Court of Justice of the European Communities, under Article 177 of the E.E.C. Treaty, to decide whether Article 119 was directly applicable, i.e. whether it conferred rights on individuals independently of any implementing measures which might have been adopted by Community institutions or national authorities.

The Court of Justice of the European Communities made a distinction between overt and disguised discrimination. Article 119 was directly applicable in so far as it prohibited overt discrimination, 'in particular in the case of those forms of discrimination which have their origin in legislative provisions or collective labour agreements, as well as where men and women receive unequal pay for equal work which is carried out in the same establishment or service, whether private or public'. In the case of more subtle kinds of discrimination, Article 119 was not directly applicable, because it needed to be supplemented by implementing measures adopted by Community institutions or national authorities. There is no doubt that the discrimination which

<sup>1</sup> Differences of detail between different systems of municipal law do not prevent the application of general principles of law where there is an underlying common principle. One can also say that there is a general principle of law when different systems of municipal law achieve the same result by different means; for instance, the trust is sometimes used in English law to achieve the same result as a *stipulation pour autrui* in French law.

<sup>2</sup> *William Cory & Son Ltd. v. London Corporation*, [1951] 2 K.B. 476.

<sup>3</sup> David Foulkes, *Introduction to Administrative Law*, fourth edition (1976), pp. 60-3.

<sup>4</sup> [1976] E.C.R. 455.

<sup>5</sup> Pay, for this purpose, does not include social security benefits such as retirement pensions. Discrimination on grounds of sex as regards such benefits is not contrary to the E.E.C. Treaty: *Defrenne v. Belgian State*, [1971] E.C.R. 445.



Miss Defrenne had suffered constituted overt discrimination, and consequently, as far as her claim was concerned, Article 119 was directly applicable.

The Court's distinction between overt and disguised discrimination was based by implication on a test which the Court has frequently applied to determine whether a provision of the E.E.C. Treaty is directly applicable; a provision is directly applicable if 'it is clear and sufficiently precise in its content, does not contain any reservation and is complete in itself in the sense that its application by national courts does not require the adoption of any subsequent measures of implementation either by the [member] States or [by] the Community'.<sup>1</sup> Unfortunately, however, the Court did not *expressly* apply this test to Article 119. Instead, the Court argued that Article 119 was capable of being directly applicable in certain circumstances because it formed part of the foundations of the Community; it not only formed an essential part of the social policy laid down by the E.E.C. Treaty, but was also necessary in order 'to avoid a situation in which undertakings established in States which have actually implemented the principle of equal pay suffer a competitive disadvantage in intra-Community competition as compared with undertakings established in States which have not yet eliminated discrimination against women workers as regards pay.' But it is respectfully submitted that such reasoning is fallacious and dangerous. The undeniable importance of Article 119 does not logically require that Article 119 must be treated as directly applicable; for instance, no one would deny the importance of the General Agreement on Tariffs and Trade (G.A.T.T.), and yet the Court has held that G.A.T.T. is not directly applicable.<sup>2</sup> Moreover, the apparent substitution of a new criterion of direct applicability for the criterion applied by the Court in previous cases runs the risk of introducing uncertainty and confusion into the law.

The Court was on safer ground when it pointed out that the use of the word 'principle' in Article 119 should not be invoked as an argument for attenuating Article 119 'to the point of reducing it to the level of a vague declaration'; on the contrary, 'in the language of the Treaty, this term is specifically used in order to indicate the fundamental nature of certain provisions'.

The Court went on to say:

It is also impossible to put forward arguments based on the fact that Article 119 only refers expressly to 'member States'. Indeed, as the Court has already found in other contexts, the fact that certain provisions of the Treaty are formally addressed to the member States does not prevent rights from being conferred at the same time on any individual who has an interest in the performance of the duties thus laid down.

When Article 119 referred to 'member States', it did not refer solely to the *legislatures* of member States.

Therefore, the reference to 'member States' in Article 119 cannot be interpreted as excluding the intervention of the courts in direct application of the Treaty. . . . In fact, since Article 119 is mandatory in nature, the prohibition on discrimination between men and women applies not only to the action of public authorities, but also extends to all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals.

The Belgian court also asked the Court of Justice of the European Communities to decide whether Article 119 had become 'applicable in the internal law of the member

<sup>1</sup> Per Mr. Advocate-General Trabucchi, [1976] E.C.R. 455, at p. 486. He applied this test to Article 119 and arrived at much the same result as the Court.

<sup>2</sup> See this *Year Book*, 46 (1972-3), p. 445.

States by virtue of measures adopted by the authorities of the E.E.C.', or whether national legislatures must 'be regarded as alone competent in this matter'. At first sight the division of power between Community authorities and national authorities would appear to be relevant only to cases of disguised discrimination, since the Court had already ruled that Article 119 was directly applicable to cases of overt discrimination, without any need for further action either by Community authorities or by national authorities. However, even in cases of overt discrimination, as we shall see, action (or inaction) by Community and national authorities did have an indirect effect on the *time* from which Article 119 became directly applicable *in practice*.

Article 119 provided that the application of the principle of equal pay was to be ensured by the end of the first stage of the transitional period at the latest, i.e. by the end of 1961. However, as this time limit approached, it became obvious that some member States would be unable to comply with it. Accordingly, the six member States adopted a resolution on 30 December 1961 which purported to extend the time limit to 31 December 1964; but even this time limit was not complied with by some of the member States. After 1964 the Commission tried to persuade member States to carry out their obligations under Article 119, but did not press the issue strenuously; it was not until 1973 that the Commission threatened to sue the defaulting States under Article 169 of the Treaty, and even this threat was not followed by any further action. On 10 February 1975 the Council adopted Directive No. 75/117 to implement Article 119, covering overt discrimination as well as disguised discrimination.

The Court held that the resolution of 30 December 1961 could not validly amend the time limit fixed by Article 119, because, 'apart from any specific provisions, the Treaty can only be modified by means of the amendment procedure carried out in accordance with Article 236' (which requires, *inter alia*, ratification by all member States).

This ruling seems unduly formalistic, in view of the fact that the resolution of 30 December 1961 had been unanimously adopted by the member States; if the member States intended the resolution to amend Article 119, effect ought to be given to their intention, despite the informal character of the resolution. In substance, if not in form, the resolution was 'an *agreement* reached between the representatives of the member States meeting in Council',<sup>1</sup> and, if an *accord en forme simplifiée* can terminate a ratified treaty,<sup>2</sup> there is no reason why it should not be capable of amending a ratified treaty.

The Court also held that Article 119 could not be modified by Directive No. 75/117, which was adopted on the basis of Article 100 dealing with the approximation of laws and was intended to encourage the proper implementation of Article 119 by means of a series of measures to be taken on the national level, in order, in particular, to eliminate the indirect forms of discrimination, but was unable to reduce the effectiveness of that article or modify its temporal effect.

This conclusion is clearly correct. A directive is by definition intended to implement the Treaty and not to amend it. Since the member States did not *intend* the directive to amend the Treaty, the question whether they *could* amend the Treaty by a directive did not arise.

At the most, Directive No. 75/117 could be regarded as an element of subsequent practice interpreting the Treaty, and the fact that the member States considered it

<sup>1</sup> Per Mr. Advocate-General Trabucchi, [1976] E.C.R. 455, at p. 487 (italics added).

<sup>2</sup> McNair, *The Law of Treaties* (1961), p. 506. See also the *Walder* case, [1973] E.C.R. 599, where the Court held that an amendment to E.E.C. Regulation 3 on social security had replaced a treaty on social security between two member States.



necessary to issue a directive to implement Article 119, even in cases of overt discrimination, might be regarded as evidence that member States did not believe that Article 119 was directly applicable. But subsequent practice is usually not *conclusive* evidence of the interpretation of a treaty, and the Court was therefore entitled to interpret Article 119 in a way which differed from the apparent beliefs of member States about its interpretation.

As regards disguised discrimination, the Court held that Article 119 was not directly applicable, but said that in such cases national legislatures did not have *exclusive* competence to implement Article 119; 'such implementation . . . may be achieved by a combination of Community and national provisions'.

As regards overt discrimination, Article 119 was directly applicable since 1 January 1962 (or 1 January 1973 in the case of the three new member States). However, the British and Irish governments, which intervened in the proceedings before the Court, argued that many employers would go bankrupt if they were forced to meet claims for equal pay backdated to 1 January 1973. The Court met this objection in the following words:

Although the practical consequences of any judicial decision must be carefully taken into account, it would [normally] be impossible to go so far as to diminish the objectivity of the law and compromise its future application on the ground of the possible repercussions which might result, as regards the past, from such a judicial decision. However, in the light of the conduct of several of the member States and the views adopted by the Commission and repeatedly brought to the notice of the circles concerned, it is appropriate to take *exceptionally*<sup>1</sup> into account the fact that, over a prolonged period, the parties concerned [i.e. the employers] have been led to continue with practices which were contrary to Article 119, although not yet prohibited under their national law. The fact that, in spite of the warnings given, the Commission did not initiate proceedings under Article 169 against the member States concerned on grounds of failure to fulfil an obligation was likely to consolidate the incorrect impression as to the effects of Article 119. In these circumstances, it is appropriate to determine that, as the general level at which pay would have been fixed cannot be known, important considerations of legal certainty [*sécurité juridique*] affecting all the interests involved, both public and private, make it impossible to reopen the question as regards the past. Therefore, the direct effect of Article 119 cannot be relied on in order to support claims concerning pay periods prior to the date of this judgment, except as regards those workers who have already brought legal proceedings or made an equivalent claim.

From a political point of view, this is a sensible compromise, but it is hard to justify in terms of legal principle.

### *Free movement of goods—competition—trade marks—imports from non-member States*

*Case No. 3. E.M.I. Records Ltd. v. C.B.S. United Kingdom Ltd.*<sup>2</sup> Before 1914 the Columbia Phonograph Company registered the trade mark 'Columbia' in the United States, the United Kingdom and several other countries. Subsequently, after a complicated series of assignments, the 'Columbia' trade mark in the United States became the property of C.B.S. Incorporated, and the 'Columbia' trade mark in the United Kingdom and other member States of the E.E.C. became the property of the plaintiff company and of its subsidiaries. The plaintiff company instituted proceedings against the defendant, the British subsidiary of C.B.S. Inc., in the English High Court, to prevent sales by the defendant in the United Kingdom of records bearing the trade

<sup>1</sup> Italics added.

<sup>2</sup> [1976] E.C.R. 811.



mark 'Columbia' which had been manufactured by C.B.S. Inc. in the United States; the plaintiff argued that such sales infringed its right to the exclusive use of the trade mark 'Columbia' in the United Kingdom. The defendant pleaded various rules of Community law as a defence, and the High Court referred the case to the Court of Justice of the European Communities for a preliminary ruling under Article 177 of the E.E.C. Treaty.

Where a trade mark belongs to one person in one member State and to another person in another member State, neither holder is allowed to use his trade mark to prevent exports to one member State from another member State, if the trade mark had been placed on the exported goods in the other member State by the person entitled to use the trade mark in that State and if the trade marks in the two member States had a common origin, i.e. had originally belonged to one and the same person. This rule, based on Article 36 of the E.E.C. Treaty, had been laid down by the Court of Justice of the European Communities in *van Zuylen v. Hag*.<sup>1</sup> In the present case the defendant argued that this rule also applied when (as in the present case) a trade mark in a member State and a trade mark in a non-member State had a common origin. The Court rejected this argument on the grounds that Article 36 was expressly directed against 'restrictions . . . on trade between member States', and not against restrictions on trade between member States and non-member States.

The defendant had tried to resist this conclusion by pointing out that some agreements concluded by the E.E.C. with certain non-member States contained provisions very similar to Article 36.<sup>2</sup> The Court's answer was simple:

The binding effect of commitments undertaken by the Community with regard to certain countries cannot be extended to others.

The Court's judgment is to be welcomed. If the rule in *van Zuylen v. Hag* had been extended to imports from non-member States, the rights of holders of trade marks would have been eroded to a startling degree, and the advantage conferred on manufacturers in non-member States would have been wholly one-sided, since they would have remained free to use their trade marks to prevent exports of goods bearing those trade marks from the E.E.C. to the non-member States concerned.

Although Article 36 does not apply to imports from non-member States, there are other provisions of the E.E.C. Treaty which can apply, particularly Articles 85 and 86.

Article 85 prohibits 'all agreements between undertakings, decisions by associations

<sup>1</sup> [1974] E.C.R. 631. Article 36 does not prevent the holder of a trade mark in one member State from using his trade mark to prevent imports of goods bearing the trade mark from another member State, if the trade marks in the two member States do not have a common origin: *Terrapin v. Terranova*, [1976] E.C.R. 1039.

<sup>2</sup> e.g. Article 4 of the Lomé Convention (*International Legal Materials*, 14 (1975), p. 607). Mr. Advocate-General Warner reserved his position concerning the interpretation of the Lomé Convention, but said ([1976] E.C.R. 861-2):

The meaning of words depends on the context in which they are found and the same words used in different instruments brought into existence for different purposes may mean different things. None of the instruments cited by the defendants was brought into existence for the purpose of creating a common market and it cannot be right to interpret them as if they were.

Article 36 of the E.E.C. Treaty is somewhat similar to Article XX of G.A.T.T., but the Court's interpretation of Article 36 in *van Zuylen v. Hag* is very different from the way in which Article XX has been applied in practice. This is one of the grounds on which F. A. Mann criticizes the judgment in *van Zuylen v. Hag* (*International and Comparative Law Quarterly*, 24 (1975), p. 31). But, as Mr. Advocate-General Warner said, 'the same words used in different instruments brought into existence for different purposes may mean different things'.

of undertakings and concerted practices which may affect trade between member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market'. Article 85 does not apply unless there is some collaboration between two or more undertakings. What the holder of a trade mark does on his own is not caught by Article 85, but the Court warned that the exercise of his rights under the trade mark 'might fall within the ambit of the prohibitions contained in the Treaty if it were to manifest itself as the subject, the means or the consequence of' the type of collaboration prohibited by Article 85. The Court went on to say, in paragraphs 28 and 29 of its judgment:

A restrictive agreement between traders within the common market and competitors in third countries that would bring about an isolation of the common market as a whole, which, in the territory of the Community, would reduce the supply of products originating in third countries and similar to those protected by a mark within the Community, might be of such a nature as to affect adversely the conditions of competition within the common market.

In particular if the proprietor of the mark in dispute in the third country has within the Community various subsidiaries established in different member States which are in a position to market the products at issue within the common market such isolation may also affect trade between member States.

These two paragraphs need to be read with some care. Two conditions have to be met before Article 85 applies: the agreements, decisions or practices in question must 'have as their object or effect the prevention, restriction or distortion of competition within the common market', and they must be capable of affecting trade between member States. Paragraph 28 deals with the first requirement and paragraph 29 deals with the second requirement.

In the case of the first requirement, it must be proved that the purpose or effect of the restrictive practice is to prevent, restrict or distort competition; the possibility of its having that effect is not enough, unless the effect actually occurs or was intended to occur. However, if companies outside the E.E.C. agree with companies in the E.E.C. not to sell in the E.E.C., it is difficult to see how this agreement can fail to reduce the amount of competition in the E.E.C.; and so this first requirement is probably easier to satisfy than paragraph 28 of the Court's judgment implies.<sup>1</sup>

The second requirement is at first sight even easier to satisfy; it is sufficient to prove that the practice is *capable* of affecting trade between member States, and there is no need to prove that it *does* have that effect or that it was *intended* to have that effect. And yet restrictions on trade between a non-member State and a member State are not necessarily capable of affecting trade between member States; the possibility that the goods would be imported from a non-member State into a member State, if the restrictions on competition did not exist, is not enough, unless one can also show that there is a possibility that the goods would then be re-exported from that member State to another member State. This second possibility might exist if the holder of the trade mark in a non-member State had a subsidiary in one member State which was capable of marketing the goods in another member State, and no doubt there are also other ways of showing that such a possibility exists.<sup>2</sup> But there are bound to be cases where

<sup>1</sup> Moreover, in such circumstances public international law would permit the E.E.C. Commission to impose fines on all the companies concerned, including the foreign companies: see this *Year Book*, 46 (1972-3), pp. 145, 192-3, 196-7 and 201-3 (the cross-reference on p. 193, n. 1, should be to p. 152 (not 153), n. 3).

<sup>2</sup> It is submitted that paragraph 29 of the Court's judgment did not intend to exclude these other ways; the words 'in particular' qualify the protasis, not the apodosis.



such a possibility cannot reasonably be shown to exist, and consequently this second requirement is paradoxically harder to satisfy than the first.<sup>1</sup>

Trade marks are often used to enforce market-allocation agreements, which are prohibited by Article 85 (1) (c). It is therefore understandable that the exercise of a trade mark right 'might fall within the ambit of the prohibitions contained in the Treaty if it were to manifest itself as the subject, the means or the consequence' of a market-allocation agreement. But the holder of a trade mark may have perfectly legitimate reasons for assigning the trade mark in some countries but not in others (i.e. if he only has enough capital to exploit the trade mark in a small number of countries). A distinction therefore needs to be drawn between assignments which form part of a continuing arrangement to enforce the allocation of markets, and assignments of a more innocent character. The Court said:

For Article 85 to apply to a case, such as the present one, of agreements which are no longer in force it is sufficient that such agreements continue to produce their effects after they have formally ceased to be in force.

An agreement is only regarded as continuing to produce its effects if from the behaviour of the persons concerned there may be inferred the existence of elements of concerted practice and of coordination peculiar to the agreement and producing the same result as that envisaged by the agreement.

This is not so when the said effects do not exceed those flowing from the mere exercise of the national trade mark rights.

This represents a welcome retreat by the Court from the excessively wide interpretation of Article 85 which it had adopted in *Sirena v. Eda*.<sup>2</sup>

Finally, the Court considered the relevance of Article 86 of the E.E.C. Treaty, which prohibits 'any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it . . . in so far as it may affect trade between member States'. The Court said:

Although the trade mark right confers upon its proprietor a special position within the protected territory this, however, does not imply the existence of a dominant position . . . , in particular where, as in the present case, several undertakings whose economic strength is comparable to that of the proprietor of the mark operate in the market for the products in question and are in a position to compete with the said proprietor.

Furthermore in so far as the exercise of a trade mark right is intended to prevent the importation into the protected territory of products bearing an identical mark, it does not constitute an abuse of a dominant position within the meaning of Article 86 of the Treaty.<sup>3</sup>

For these reasons, the Court gave the following ruling:

The principles of Community law and the provisions on the free movement of goods

<sup>1</sup> But it is not as hard to satisfy as Mr. Advocate-General Warner suggested when he said that it was necessary to prove 'that, if such records were imported into the Community, they would be *likely* to become, to a significant extent, the subject-matter of trade between member States' ([1976] E.C.R. 863; italics added). Article 85 does not prohibit practices which are *likely* to affect trade between member States; it prohibits practices which *may* affect (*sont susceptibles d'affecter*) trade between member States. See *International and Comparative Law Quarterly*, 13 (1964), p. 1468.

<sup>2</sup> [1971] E.C.R. 69, criticized in this *Year Book*, 46 (1972-3), p. 458. See also the comments on *Sirena v. Eda* by Mr. Advocate-General Warner in the present case: [1976] E.C.R. 864-6.

<sup>3</sup> However, although the 'exercise of a trade mark right . . . to prevent the importation into the protected territory of products bearing an identical mark' is not an abuse of a dominant position, charging an exorbitant price *can* be an abuse of a dominant position if the holder of the trade mark enjoys a dominant position: see this *Year Book*, 43 (1968-9), pp. 257-8, and 46 (1972-3), pp. 459-60.



and on competition do not prohibit the proprietor of the same mark in all the member States of the Community from exercising his trade mark rights, recognized by the national laws of each member State, in order to prevent the sale or manufacture in the Community by a third party of products bearing the same mark, which is owned in a third country, provided that the exercise of the said rights does not manifest itself as the result of an agreement or of concerted practices which have as their object or effect the isolation or partitioning of the common market.

In so far as that condition is fulfilled the requirement that such third party must, for the purposes of his exports to the Community, obliterate the mark on the products concerned and perhaps apply a different mark forms part of the permissible consequences of the protection which the national laws of each member State afford to the proprietor of the mark against the importation of products from third countries bearing a similar or identical mark.

MICHAEL AKEHURST



## REVIEWS OF BOOKS

*La Prassi Italiana di Diritto Internazionale, Prima serie (1861-1887)*. Vols. I and II, edited by R. AGO and M. TOSCANO. Società Italiana per l'Organizzazione Internazionale — Consiglio Nazionale delle Ricerche. Dobbs Ferry, New York: Oceana Publications, 1970. Vol. I, lxxxix+523 pp.; Vol. II, xxxiv+527-1171 pp. \$25.

Before the publication of these two volumes Italy was one of the several countries that lacked a collection of documents reflecting State practice in the field of international law. The purpose of these volumes is finally to fill this serious gap. Under the general editorship of Professors R. Ago and M. Toscano and with the sponsorship of the Italian Society for International Organization (S.I.O.I.) and of the National Research Council (C.N.R.), a number of prominent Italian international lawyers are collecting for publication all documents kept in the State archives, particularly in those of the Ministry for Foreign Affairs, as well as parliamentary debates and legislative acts relevant to public international law. The whole collection is destined to cover the period 1861-1945. The first series of volumes starts from 17 March 1861, date of the proclamation of the Kingdom of Italy, and goes up to 31 July 1887, date of the formation of the first Crispi cabinet. According to the 'Introductory Notes', 'the reasons for the selection of this final date are at least two. First, with Crispi's advent to power the Italian administration underwent a complex reorganization and a more active political era began, with considerable influence on international relations. . . . Secondly . . . the re-ordering of the structure and function of the administration carried out by Crispi also involved the organization of the Ministry for Foreign Affairs and of its archives. These were reorganized along markedly different lines' (vol. I, pp. xxxvii-xxxviii). The second series, to be published shortly, will cover the period 1887-1918, while a third series should cover the period 1919-45.

This collection embraces diplomatic documents (including instructions issued to Italian plenipotentiaries for negotiations to conclude treaties), parliamentary debates (mainly declarations made in Parliament by the President of the Council of Ministers and by the Minister for Foreign Affairs but also occasional statements made by the 'speaker for the majority' on specific bills) and legislative acts relating to international questions. The collection does not include either Italian judgments on international law (which are the subject of a different research project being carried out by other Italian international lawyers) or Italian legal literature (references to it have only been kept when documents included in the collection quote writers or reproduce extracts from scholarly writings; they have been then rightly considered as integral parts of the documents).

The criteria chosen for ordering the documents are at the same time exhaustive, appropriate and flexible: a rigid classification using modern headings would have been 'unsuitable for a work which follows the development of practice over a long span of time'. The collection has been subdivided into fourteen parts, corresponding to broad chapters of international law. The first volume includes eight sections: General Problems of International Law; Jus non Scriptum; the Law of International Transactions; International Legal Facts and Unilateral Acts; International Persons;



International Unions, Institutions and Organizations; Agents of International Persons; Fundamental Rights and Duties of States. The second volume includes the other six sections which are as follows: Position of Individuals; State Territory, Seas and Space; State Responsibility; Peaceful Settlement of Disputes; Compulsory Means of Settlement of Disputes and Use of Force; The Law of Warfare. It is apparent from this list that the general scheme of classification is modelled upon the classification of international law usually adopted by Italian treatises or other standard Italian works. This classification does not lend itself to any major objections. As is rightly stressed in the 'Introductory Notes', the various parts 'seem capable of remaining constant throughout the span of time under consideration. But inside each part, the subdivision into chapters and the further subdivisions are necessarily destined to vary with the historical period. In other words, while the articulation into "parts" corresponds roughly to the articulation of contemporary international law, the further distinctions reflect the state of practice in the respective periods' (vol. I, pp. xl-xli).

Consultation of the work is facilitated by the very comprehensive scheme of classification. Furthermore, the documents or passages thereof included under each heading are usually preceded by a short introduction, made for the purpose of indicating the factual circumstances in which the document was written. References to other cases somehow linked with the subject-matter of the entry make it easier to understand the general background against which documents must be seen and, when documents have been split up to fit into the various categories, to get a general overview of the whole 'case'. A volume containing a systematic index, to be published shortly, will further facilitate consultation of the work.

Unfortunately, for the foreign scholar who has no command of Italian, the documents are reproduced in Italian and are not translated into other languages (some of them, however, were written in French, which was then used by Italian diplomats even among themselves and have of course been left in this language). However, in order to offer some help to foreign readers, the 'Foreword' (by R. Ago), the 'Introductory Notes' (describing the methodological criteria followed) and the 'Table of Contents' (which gives the general classification of the matter) are presented in English, French and Spanish.

When faced with a work of this kind it is very difficult for a reviewer to pass judgment on the choice of each specific document. One can only pronounce on the criteria adopted for selecting the material (which, in the present writer's view, are excellent) and on whether the documents quoted can easily be understood by the reader (in this respect also one cannot but pass a favourable judgment). It can be added that, even at a cursory glance at the various entries, the wealth of Italian practice of international law is striking. Furthermore, although this practice relates to a bygone period, most of it is still of great interest. In this respect suffice it to point to such sections as those relating to the law of international transactions (vol. I, pp. 19-94), to fundamental rights and duties of States (vol. I, pp. 493-523), to the position of individuals (vol. II, pp. 527-704) and to the law of warfare (vol. II, pp. 949-1171).

ANTONIO CASSESE

*Mezhdunarodnoe morskoe pravo.* By C. JOHN COLOMBOS. Moscow: izd-vo Progress, 1975. 782 pp.

A Russian edition of Colombos's sixth edition of *The International Law of the Sea* (1967) eight years after its appearance in London (although a 1972 printing date is

given on the English-language title page) is somewhat of a surprise given the vast changes in the law of the sea from 1966 to 1975. But the 1953 Russian translation of the second edition, edited with a preface by the late S. B. Krylov, has long been out of print, and, even though Colombos virtually 'ignores the Soviet Union and its doctrine and practice in the law of the sea',<sup>1</sup> for a reasonably modern exposition in the classical tradition of the Anglo-American approach to the law of the sea most Soviet international lawyers believe there is nothing else at present available.

The new translation was prepared by the same individuals who translated the 1953 text: V. V. Zaitseva and N. I. Kuz'minskii. An introductory article and the general editorship of the translation were the responsibilities of two senior Soviet maritime lawyers: A. K. Zhudro, who is President of the Soviet Association of Maritime Law and deputy director of *Soiuzmorniiiproekt*, the research arm of the U.S.S.R. Ministry of the Maritime Fleet, and Dr. M. I. Lazarev, the director of the Sector for the Law of the Sea of the U.S.S.R. Academy of Sciences Institute of State and Law. Explanatory notes for the text were prepared by V. A. Kiselev and P. V. Savas'kov.

In their introductory article Messrs. Zhudro and Lazarev recount the vast changes in the law of the sea since the first Russian edition appeared and review the economic and technological factors at work in shaping them. The results of the 1958 and 1960 Geneva Conferences on the Law of the Sea are evaluated in the light of 'the strong impulse for the development of the world economy and of serious social changes in the world' (p. 9). Colombos wrote 'in the classical traditions of bourgeois international lawyers' and 'therefore sets forth in detail the traditional use of the oceans, especially navigation . . .'. As a whole, 'the book contains rich concrete material, an exposition of the Anglo-American doctrine and practice in the law of the sea, and numerous cases and precedents' (p. 10). Colombos is described as a scholar but principally a practitioner who wrote in the positivist tradition with a splendid grasp of the art of legal analysis of international legal norms. 'At the same time it is characteristic that many, including very important and complex, questions advanced by life during the past decade are not embraced within the outline and presentation usually adopted by a "classical" bourgeois author and generally remain beyond the scope of the book' (p. 11).

The editors further note that some of Colombos's utterances are 'alien to us by virtue of their class and ideological orientation'. The book lacks 'a profound socio-economic analysis of legal and social phenomena and an ability to evaluate them on the basis of the laws of class struggle. . .'. Although the book is rich in factual and normative materials, the reader is cautioned that the book 'contains a number of wholly incorrect propositions from the position of the Marxist-Leninist science in state and law', especially an exaggeration and sometimes a distortion of 'the role of the Royal Navy in world history'. Some of these are the object of notes by the commentators. Three issues the Soviet editors believe especially should have been discussed at much greater length in the book are environment, freedom of scientific research and the role of international institutions. They also note that the traditional division between the law of peace and the law of war is preserved by Colombos, although they regard the distinction as obsolete.

Some final paragraphs of the introduction are devoted to the law of the sea negotiations as of 1975, with a brief résumé of the Soviet position favouring freedom of the

<sup>1</sup> T. M. Starzhina, 'Novoe v shestom izdanii kursa "Mezhdunarodnoe morskoe pravo" Kolombosa', in V. F. Kotok (ed.), *Problemy gosudarstva i prava na sovremennom etape* (Moscow, 1973), pp. 290-6 (Institut gosudarstva i prava Akademii nauk SSSR. Trudy nauchnykh sotrudnikov i aspirantov, Vyp. 7).



seas, a twelve-mile territorial sea, and freedom of passage for all vessels through straits and archipelagic waters used for international navigation. Colombos's work continues to be significant, they suggest, 'may be useful for work relating to codification of the law of the sea', and will for future generations be used as a reference point for authoritative commentary.

Messrs. Kiselev and Savas'kov in a separate section of notes offer 127 asterisked annotations on various portions of the text. Some comment on or explain Colombos's views, or define certain terms of international law (e.g., custom), or indicate where the author exaggerates the role of national courts in international legal norm-formation (section 4), or interpret certain terms of English or foreign law or certain institutions (Court of Admiralty, Trinity House), offer historical observations, new sources, recent international agreements and the like, and otherwise clarify points likely to be unfamiliar to a Soviet reader. Some of these are of considerable importance and interest for the western scholar, for example:

The frontiers of the U.S.S.R. polar sector are not state frontiers and their proclamation in and of itself does not predetermine the question of the legal regime of sea expanse within the sector. The question of the legal regime of the Arctic seas should be resolved with respect to each sea specially, proceeding from general principles of international law, the application and recognition of the order actually formed and existing over many years, and from political, defense, economic, and other considerations determining the legal regime of a particular expanse of sea (p. 764, annotation to § 140).

The book is published in an attractive edition of 5,000 copies and priced at 3 rubles, 52 copecks (c. £3).

W. E. BUTLER

*The International Monetary Fund 1966-1971*. Volume I: Narrative. Volume II: Documents. By MARGARET GARRITSEN DE VRIES. Washington, D.C.: International Monetary Fund, 1977. \$15.00 the set.

This history of the International Monetary Fund between 1966 and 1971 is a sequel to the two Volumes covering the years 1945 to 1965 and reviewed in this *Year Book*, 44 (1970), p. 256. The first volume of the new set which is accompanied by a second volume of documents is written exclusively by Mrs. M. G. de Vries who was one of the co-authors of the earlier work. She is an economist who in May 1973 was appointed Historian to the Fund. It is, therefore, not surprising that the great legal issues which arose during the period recorded by her are not reflected in this book. The period witnessed the birth and early history of the Special Drawing Rights, which are described in meticulous detail on the first 250 pages, though nothing at all is said about the legal character of that curious instrument of credit. The period also witnessed the demonetization of gold, the devaluations and the floating of currencies and, in short, the 'collapse of the par value system'. Since this was the cornerstone of the International Monetary Fund, its collapse meant the end of the International Monetary Fund as an international *monetary* institution, as opposed to a source of credit, and led to innumerable legal problems. None of them is mentioned. Nor does Mrs. de Vries, whose Foreword is dated December 1976, make any reference to the spate of decisions which the abandonment of a fixed gold price produced and which reflect the disappointment of those who placed their trust in the continued efficacy of the Fund. Nor is Kerr J.'s remarkable decision in *Lively & Co. Ltd. v. City of Munich*, [1976] 1 W.L.R. 1004, rendered on 30 June 1976, mentioned.



It may be that occasionally lawyers will find this work useful for purposes of reference. But for them it is unlikely to provide much enlightenment.

F. A. MANN

*International Adoptions and the Conflict of Laws.* By INGRID DELUPIS. Stockholm: Almqvist & Wiksell International, 1975. 87 pp. Sw. Kr. 47.; U.S. \$11.

The modest size of this interesting study is in striking contrast to the formidable scale of the international problem of adoption with which it deals. Apart from the character of the institution, dating from classical times, as a remedy for childlessness, adoption in our day has assumed the more urgent form of a means of mitigating the disasters of war. In this large-scale aspect it has acquired a somewhat different character. The events following the end of the Vietnam war present a typical example of the international social situation in which the children to be adopted and the would-be adopters are not only not of the same people and place, but may well belong to opposite ends of the earth. This is the consequence of the destruction of a nation's generation of parents, and it is gratifying that the solution transcends national, racial and religious frontiers.

In this problem of social imbalance and social and cultural differences, the need for legal regulation on an international level is manifest. Yet it is in the area of family law and personal status that a uniform legal treatment of the common international problem is most difficult, even where, as in the case of children, the general principle is widespread that the welfare of the child should be the paramount consideration. Important international attempts have been made to deal with the problem of providing effective legal machinery to ensure the reality of this principle and the welfare of the child. The Council of Europe, the Institute of International Law, the International Law Association and the Hague Conference on Private International Law have all been actively concerned with this matter. As a participant in the sessions of the Hague Conference on Private International Law leading to the Convention of 1965 on International Adoption, the writer is able to testify to the concern that is shown by many countries, including the United Kingdom, to devise an effective legal solution of the problems involved in international adoptions. Yet one cannot help wondering how detached from the real and immediate problem of human survival are the efforts of the lawyers to construct an international machinery to deal with this matter. Have any of them—indeed has Professor Delupis herself—ever met and talked to an 'internationally adopted' child? It is a regrettable gap in the reviewer's knowledge.

It is gratifying that Professor Delupis has devoted her talents and her time to the study of the English rules of private international law relating to adoption. She has expanded her study beyond English law, and refers to various types of adoption. Her study gives a good overall view of the topic, but it does not cover all the English authorities on private international law. She explains in a helpful way the Hague Convention of 1965, but when she is speaking of the decision to confine the Convention to the adoption of those under 18, she is mistaken in saying that many voices at the Conference spoke out in favour of extending adoption to cover adults. So far as the writer recalls, there was only limited support for the Belgian representative who made this proposal.<sup>1</sup> She makes no reference to the recommendation of the Institute of International Law on the Effects of Adoption in Private International Law (1973).

<sup>1</sup> See the present writer's 'The Tenth Session of the Hague Conference on Private International Law', *International and Comparative Law Quarterly*, 14 (1965), p. 528, at p. 533.

Professor Delupis deals clearly and usefully with the two situations of the operation of the Adoption Convention and the recognition of foreign adoptions in the absence of treaties. She has performed a valuable service in reminding us of the importance of this subject and the shortcomings of our efforts to deal with it in terms of private international law.

R. H. GRAVESON

*Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations.* By EILEEN DENZA. New York: Oceana Publications; London: The British Institute of International & Comparative Law, 1976. 348 pp.

The short title on the spine of this admirable book could give a wrong impression of it. It is not, and nowhere sets out to be, a treatise on diplomatic law. It is, as the small-type subtitle appearing on the title page indicates, an article-by-article commentary on the Vienna Convention on Diplomatic Relations.

This is by far the most widely ratified of the codification conventions resulting from the labours of the International Law Commission. Accordingly this Convention and its legislative history have an interest and importance extending beyond the confines of the law of diplomatic relations, interesting and important as that is in its own right; and not least because the Convention contains considerable elements of 'progressive development' besides codification in the narrower sense.

The book has a short introduction which speaks of the convention generally and then picks out, for very brief description, the six provisions that 'may be singled out as particularly significant', namely, articles 22, 27, 31, 34, 37 and 38. There follow systematic commentaries on the Preamble to the Convention, on each of the Articles in turn, and finally on the Optional Protocols on 'Acquisition of Nationality' and on 'Settlement of Disputes'. Each commentary has in the main a description of the legislative history of the provision, and then of problems, doubts and solutions shown by subsequent practice. The practice relied upon is almost entirely United Kingdom practice, in respect of which the author speaks with authority, having been during a number of the pertinent years Departmental Legal Adviser to the Protocol and Conference Department of the United Kingdom Foreign and Commonwealth Office.

An Appendix tables the parties to the Convention and the Protocols, and another gives the text of the Convention in its entirety.

Within the limits that the author has set herself—a systematic commentary on the provisions of the Convention and its Protocols in the light of the British practice in application of the Convention—this is wholly to be commended as an excellent piece of work. It is written throughout in readable, economical and perspicuous English. It must quickly become an indispensable work of reference.

R. Y. J.

*International Law of Arms Control: Loose-leaf Commentary.* By GUNDOLF FAHL. Foreword by Suzanne Bastid. Berlin Verlag, 1975. Supplement, 1976. Basic text: 680 pp.

This loose-leaf collection of treaties, resolutions and other documents is an excellent accessory for lawyers and others. The instruments are presented in their English



texts together with a German translation. The major items are accompanied by a short commentary. Treaty information is provided and certain other factual material is set forth on such matters as the incidence of nuclear tests. Dr. Fahl is to be congratulated: his book constitutes a major work of reference.

IAN BROWNLIE

*International Law*. By D. W. GREIG. 2nd edition. London: Butterworths, 1976. xxi+919 pp.+index. Cased, £18.00; limp, £12.50.

Since publication of the first edition in 1970 Professor Greig's book has established itself as a leading text for undergraduates. The new edition retains the best features of its predecessor, a critical elucidation of basic principles and an unusually detailed account of the law of international organizations, whilst incorporating a considerable amount of new material to take account of developments to the end of 1974 and some way beyond. The second edition is two hundred pages longer than the first and the extra pages have been used to good effect.

Full account is taken of the recent case law of the International Court. The decision in the *Nuclear Tests* cases receives a detailed appraisal and is rightly seen to raise a number of political and jurisprudential problems. An equally critical view is taken of the 1970 *Barcelona Traction* decision, though the Court's controversial enunciation of the doctrine of preferential rights in the *Fisheries Jurisdiction* cases is seen as a constructive contribution to the debate on fishery conservation. As might be expected, the *Namibia* opinion receives a good deal of attention. Its bearing on the relationship between Articles 56 (1) and 60 of the Vienna Convention on the Law of Treaties is examined and support is expressed for Fitzmaurice's view that a judge *ad hoc* could have been appointed for the case under Article 68 of the Statute. On the question of whether, in view of the controversy over some of the facts, the Court was competent to handle the case, Professor Greig suggests that the reasoning of the judgment could dangerously extend the advisory competence and prefers the narrower justification advanced by Judge Castro.

The detailed treatment of municipal law which was a feature of the first edition now includes a discussion of the relationship between English law and the law of the European Economic Community, as well as several recent cases. The attempt to summarize the troublesome case of *Boys v. Chaplin* is not successful, however, and requires more than an admonitory footnote if it is not to mislead. Reference is made to the *First National City Bank* case and the *Philippine Admiral*, but, surprisingly, neither *Oppenheimer v. Cattermole* nor the 1972 European Convention on State Immunity are mentioned.

The law of the sea presents unique problems to anyone attempting to describe the current state of international law. Though the present uncertainty is properly reflected in his discussion, Professor Greig has incorporated numerous references to the U.N.C.L.O.S. 1975 Single Negotiating Text and has thus been able to bring into focus both the issues on which agreement appears to be possible and those on which States are still divided. Two limitations ought, however, to be mentioned. The discussion of the status and resources of the ocean floor is much too brief in view of the controversy surrounding the proposed International Sea-Bed Authority, and mention should surely have been made of the problem of dispute settlement and its bearing on the prospects for agreement.

Recent political events have not been neglected. The creation of Bangladesh is



examined in the context of humanitarian intervention and the discussion of Security Council Resolution 242 now includes a reference to the 1973 Arab-Israeli war. The termination of the American intervention in Vietnam by the 1973 Agreement is discussed, together with the subsequent collapse of the agreement. If, as seems likely, space is at a premium in the next edition, the detailed treatment of the Vietnam war might perhaps be reduced, to make way for discussion of the interventions in Angola, or a fuller treatment of the topical issue of 'economic aggression'.

Events today move with a rapidity which outdates legal writing almost before the ink is dry. Although as a result the learned article is often more useful to the student than any textbook, a comprehensive and well written guide to the whole subject still has a useful role to play. Professor Greig's book is such a work and can be recommended.

J. G. MERRILLS

*Répertoire suisse de droit international: Documentation concernant la pratique de la Confédération en matière de droit international public 1914-1939.* By PAUL GUGGENHEIM, with the assistance of LUCIUS CAFLISCH, CHRISTIAN DOMINICÉ, BERNARD DUTOIT and JEAN-PIERRE RITTER. Bâle: Helbing and Lichtenhahn, 1975. Vols. I-IV. xxvi+2,531 pp. (paginated as a unit). Fr. 700.

In 1957 the Swiss Federal Council decided to approve a project for the publication of a repertory of Swiss practice in public international law and these volumes represent the first stage of the undertaking. An index volume is scheduled as a subsequent and separate publication. Each chapter has its own fairly detailed list of contents. There is a wealth of material, nicely organized, bearing upon all the issues of general international law. The eleven chapters encompass the following major categories: sources (including treaties); the relations of international law and domestic law; the subjects of international law; diplomatic protection and the status of aliens; territorial sovereignty, together with a variety of ancillary matters such as servitudes and the duties arising from 'le droit du bon voisinage'; State succession; the organs of States and of international organizations; State responsibility; the settlement of disputes; the law of war; and the law of neutrality.

The richness of the collection is impressive. Contributing factors have been the special role of Switzerland in international relations and the editorial policy of including 'working documents', such as legal opinions, as well as those items which represent the view eventually acted upon by the Confederation.

The presentation is very helpful. It is efficient without tending toward the laconic. The excerpts are full enough to provide a clear picture of context, facts and principles. The technical characterization of the legal problems is of the standard to be expected of Professor Guggenheim and his assistants. The many important areas of law covered include recognition of States and governments and State responsibility. There is also significant material concerning expropriation, concessions and the 'acquired rights' of aliens. Whilst these last items are to be found without much difficulty, nonetheless the documents concerning treatment of aliens and foreign property are somewhat dispersed (see Chapter 4A and Chapter 8B). However, the persistent cross-references are a palliative. It is to be hoped that more volumes of this successful series will appear in the not too distant future.

IAN BROWNLIE

*Who Protects the Ocean? Environment and the Development of the Law of the Sea.* Edited by J. L. HARGROVE. St. Paul, Minnesota: published under the auspices of the American Society of International Law by West Publishing Co., 1975. xiv+250 pp. (including index). \$14.

The American Society of International Law set up its 'Working Group on Ocean Environment' in 1972. This volume is the result of their deliberations. It is a fine example of the interdisciplinary treatment of a key area of international law. It presents a scholarly and constructive analysis of an extremely complex problem in language which the non-specialist will find readily intelligible. The book includes an excellent index and a loose chart showing pollutants and the legal means available for their control.

In the first chapter A. A. D'Amato and J. L. Hargrove survey the problem of oceanic pollution in general terms. After describing the vulnerability of the ocean to the pressures of industrialization and economic development, they suggest that the current move towards zones of exclusive State jurisdiction will be no more successful in protecting the ocean from pollution than the traditional doctrine of freedom of the seas, unless a radical change of perspective can be achieved and the ocean regarded as an ecosystem requiring comprehensive environmental planning.

Subsequent contributors develop these themes. E. D. Goldberg and D. Menzel explain how pollutants get into the oceans and the various ways in which they can be monitored or controlled. In examining the possible remedies the authors note how the setting of safety standards and the evaluation of competing uses depend upon judgments of social utility, as well as the correct interpretation of technical data. This theme could perhaps have been pursued. Attempts to control pollution within States have certainly generated real disagreement about the value of particular ends. Proposing that the ocean be regarded as an ecosystem, rather than as, say, a dumping ground for waste, or a source of scarce minerals seems bound to provoke similar conflicts.

In his survey of international maritime environmental law today L. F. E. Goldie sees the 1972 Stockholm Conference as several steps in the right direction. Though severely critical of the political pressures which rather diluted the original statement of principles, the author sees the Conference as an endorsement of environmental protection as a major objective of international law.

Any optimism induced by Goldie's essay is dispelled by M. O. Clements's review of the economic milieu of the ocean. At a time when the economic importance of the sea has never been greater, nor more diverse, the objective of economic growth puts environmental protection low on the legal agenda of both the developed and the developing world.

If Clements points out the economic obstacles, R. L. Friedheim shows how the world political system is structurally inimical to sound environmental decision making. Bargaining, the author explains, is a far from ideal way of approaching environmental problems, a conclusion which is supported by reference to the failure of previous law of the sea conferences to deal with such issues satisfactorily.

The threads of the discussion are drawn together in the editor's final chapter, which examines the problems likely to be encountered by the Third United Nations Conference on the Law of the Sea. A good many of the author's predictions seem likely to be realized. The sessions of the Conference to date do appear to have been primarily concerned with national prerogatives and to have resembled the 'gigantic



border dispute' the editor anticipated. Whether his worst fears will be realized is as yet unclear. There can be no doubt, however, that he and his fellow contributors have correctly identified the essential elements of a solution to the problem of pollution. The ocean environment must be seen as a community issue, rather than so many pieces of national property. But State power must be utilized to enforce effective measures of environmental protection. In this way the exclusive economic zone, or its equivalent, can serve the environmental interest, if the large coincidence of coastal State and community interests can be sufficiently recognized. A comprehensive regime of State responsibility is required and a community-oriented regime of rights and duties for coastal States. Ideally there should also be a comprehensive international regulatory competence with a community power to suspend States' rights in cases of abuse.

This, then, is the prescription. Will the patients take the medicine? Eventually perhaps. Let us hope it will not be another case of too little, too late.

J. G. MERRILLS

*The Future of International Fisheries Management.* Edited by H. GARY KNIGHT. St. Paul, Minnesota: published for the American Society of International Law by West Publishing Co., 1975. xiii+253 pp. \$14.

In the last two days of the Geneva session of the Third United Nations Conference on the Law of the Sea (U.N.C.L.O.S. III), in May 1975, a 115-page Informal Single Negotiating Text (I.S.N.T.) containing 304 draft Articles was circulated to delegations. Part II of this voluminous document includes *inter alia* a number of draft Articles on jurisdiction over and management of the fisheries in the 'Exclusive Economic Zone' (Articles 45 and 50-60), the Continental Shelf (Article 63) and the High Seas (Articles 103-7). In addition, a Working Paper on Settlement of Disputes has been prepared by an informal Working Group. Neither of these documents was available to the six members of the Working Group on Living Marine Resources of the American Society of International Law who contributed to this collection of papers. Indeed, the Group completed its work prior to the Geneva Session of the Conference. Fortunately, however, the Group's intention was not to assess the current state of negotiations in U.N.C.L.O.S. III but rather to 'devise a set of principles which, taken together, would form the basis of an optimum global fisheries management policy'. It is this purpose which determines the shape of this volume. It comprises five papers on matters of substance which the Group believed to have received insufficient attention, introduced by Professor Knight's Background Paper and leading to a set of eight 'Principles for a Global Fisheries Management Régime'.

The papers are of somewhat uneven quality and importance. Professor Knight's skilfully condensed introduction places the current negotiations in historical perspective, identifies the possible objectives of fishery management and their attendant difficulties and comments on the policies advocated by the leading States in the Conference. It can be warmly recommended as a useful introduction for the newcomer to this field.

Professor Jacobson is concerned in his paper on 'Future Technology and the Third Law of the Sea Conference' to ensure that U.N.C.L.O.S. III should not repeat the mistakes of 1958 and design a régime in ignorance or disregard of future technology. In a parallel presentation of predictable technological advances and their legal implications, the reader is given fascinating glimpses of developments which may be



expected to materialize within the next three decades. The present legal implications of future technology are rather less easy to identify beyond a general plea for a flexibility of drafting which will avoid unnecessary verbal ties to current technology and the establishment of machinery which will facilitate revision of the law to keep pace with technology.

Though brief, Mr. Neumann's paper on 'Multinational Investment in Fisheries' is one of the more interesting contributions to this volume. He gives a number of abstract examples of investment by developed distant-water-fishing States or their companies in developing coastal States and shows how the *de facto* partnerships which grow out of such arrangements can be very much to the benefit of both sides.

It can be truly said of Professor Johnson's paper on 'Some Treaty Law Aspects of a Future International Fishing Convention' that he tackles an aspect of the current negotiations to which insufficient thought has been given. One problem, for example, which has worried the reviewer is what provision is to be made for reservations in the final Convention. If the 'package-deal' concept which has dictated the shape of the negotiations is also allowed to determine such questions as 'one treaty or more than one?' and 'are reservations to be permitted and if so to which articles?', U.N.C.L.O.S. III may prove to have produced an unratifiable Convention.

In the fishery provision of the I.S.N.T., the reader will find references to such concepts as 'the maximum sustainable yield, as qualified by relevant environmental and economic factors. . .'. If he is to understand the significance of such clauses and to appreciate that their incorporation in the draft articles is the result of weighing different optional goals of fishery management, the lawyer-negotiator will have to turn to the fisheries economist. He will find a very useful guide in Professor Anderson's paper on 'Criteria for Maximum Economic Yield of an Internationally Exploited Fishery'.

Finally, Mr. Goldberg deals with the important question of enforcement but on a rather abstract level. A more straightforward review of treaty patterns available for application in the various fishery régimes currently under discussion and an assessment of their acceptability would perhaps have been more useful.

The Working Group recognized at the outset that it was unlikely that an optimum global fisheries management régime would be susceptible to widespread agreement at the Law of the Sea Conference. It would seem that their object was rather to produce a set of model principles embodying such a régime, against which actual drafts and, eventually, the fruits of the U.N.C.L.O.S. labours might be tested and evaluated. In so doing, they have made a useful contribution to the current debate on the international law of the sea.

E. D. BROWN

*Vertragsinterpretation und Vertragsrechtskonvention.* By HERIBERT FRANZ KÖCK. Berlin: Duncker & Humblot, 1976. 120 pp. DM 39.60.

This little work discusses the familiar problem of treaty interpretation in the light of the Vienna Convention on the Law of Treaties (which the author tends to regard as a code actually in force). The subtitle indicates the intention to discuss the significance of Articles 31 and 32 of the Convention, but their full text is nowhere printed nor is comment upon them the author's primary aim. Instead, in language which is frequently stilted and ponderous, he surveys practice and doctrine relating to treaty interpretation before 1969, discusses the general problem of interpretation (about which more than 100 years ago Savigny, mentioned but hardly appreciated by Dr. Köck, said all

there is to say) and concludes (p. 101) 'that Articles 31 and 32 of the Vienna Convention will not be the end of the discussion on the interpretation of international treaties, but merely another contribution to this discussion. This discussion will not end before it has been universally recognized that understanding and interpretation cannot be subject to "rules", let alone legal ones'. (One may safely assume that even then the discussion will not and should not end.)

It is open to doubt whether either practice or theory of international law has been substantially enriched by this work which, though it seems to have been completed in the year 1976, does not take account of some astonishing decisions of the European Court of Justice in Luxembourg and, particularly, of the European Court of Human Rights in Strasbourg; the latter's decision rendered on February 21, 1975 in the case of *Golder v. United Kingdom*, for instance, is surely so remarkable and perhaps even amazing that no one concerned with treaty interpretation can ignore it.

F. A. MANN

*International Regulation of Marine Fisheries: a Study of Regional Fisheries Organizations.* By ALBERT W. KOERS. West Byfleet, Surrey: Fishing News (Books) Ltd., 1973. 368 pp. (including appendices and index). £5.50.

The core of this book comprises three chapters on international fisheries organizations. The first lists them in order of creation, summarizing their structure and functions. (It is somewhat surprising that, while some relatively unimportant bilateral commissions are dealt with, the European Economic Community, which has important functions in relation to fisheries, is nowhere even mentioned.) The second of these chapters deals with the structure of the organizations, and the third with their functions and powers, on a comparative basis. It may be wondered whether this comparative approach was really worthwhile; differences and similarities are often due to circumstances unique to each particular organization, with the result that we can learn little from comparing them. In other words, while the reader may conceivably wish to know that the Indo-Pacific Fisheries Council of the Food and Agriculture Organization meets once every two years, or that the International Pacific Salmon Fisheries Commission met nineteen times in 1970, it is difficult to imagine what penetrating insight can be obtained from the juxtaposition of these two pieces of information (page 134). However, taken together, the three chapters contain a great deal of useful information about the working of the organizations described. Furthermore, they demonstrate just how alarmingly disorganized matters are, despite the multiplicity of institutions. The overlapping of competence is not uncommon, nor is its opposite. Given, in particular, that the activities of one organization in its own sphere of competence may well have an important effect on the domain of another organization, rationalization seems long overdue.

In a subsequent chapter Dr. Koers puts forward his own proposals for rationalization and amelioration on a limited basis. So far as they go they seem, on the whole, sensible. However, the learned author rightly stresses that tinkering with existing institutions is not the solution. Many important fisheries are in imminent danger of destruction through over-fishing, others are fished uneconomically, while others again are grossly under-exploited. At a time when the strain on the world's food resources has reached unprecedented levels, and will get very much worse in the near future, mankind cannot afford to tolerate any longer the gross mismanagement, misuse and, some would say, maldistribution of marine resources to which the freedom of



fishing has led us. Dr. Koers has his own solutions to offer which, though sometimes unrealistic (e.g., the proposal to make the voting strength of States in his proposed World Marine Fisheries Organization proportionate to their population), are on the whole sensible. Broadly speaking, he favours preferential rights for coastal States, combined with a strong World Marine Fisheries Organization, and an enhanced role for most existing fisheries organizations. Unfortunately, at the time of writing this review, it seems very possible that the drastic steps needed to bring about the rational management of the seas' living resources may not be taken at the Third United Nations Conference on the Law of the Sea.

MAURICE MENDELSON

*Canadian Perspectives on International Law and Organization.* Edited by R. ST. J. MACDONALD, GERALD L. MORRIS and DOUGLAS M. JOHNSTON. Toronto and Buffalo: University of Toronto Press, 1974. xx+972 pp. \$35.00; £17.50.

This massive volume comprises thirty-eight essays (four of them in French) in an attempt to achieve 'the sketching of a modern Canadian world view of international law and organization'. The authors are all concerned with the teaching and/or practice of international law in Canada; many are university professors, some are in practice at the bar, some are on the staff of the Department of External Affairs or in the foreign service, one is a judge of the Supreme Court of Ontario, another a Deputy Judge Advocate General, and many of them combine experience in more than one of these fields. In drawing on this fund of legal talent and experience, the editors have tried to provide 'a fairly complete reflection of contemporary Canadian approaches to international law'.

The book is in five parts. The first, 'Perspectives', contains essays of a general nature on Canada and the international legal order, Canadian federalism and international law, the relationship between international and domestic law, and the private international law system and its relationship to public international law. In Part II, 'Practices', more particular topics—recognition, immunities, State responsibility and claims, treaty-making, immigration, extradition and asylum—are considered. Part III deals with air, communications and weather law. Part IV is concerned with 'Territorial Considerations', seven out of the nine chapters being wholly concerned with water and an eighth (on the International Joint Commission and Canada-United States boundary relations) almost entirely so concerned. The fifth and longest part of the book is on 'Canadian Participation in International Organizations'; these chapters consider the part played by Canada in a wide variety of organizations and in negotiations and conferences on many subjects, including disarmament, the protection of intellectual property and customs controls. There are also essays on international trade arbitration and international civil procedure, and one entitled 'Economic Nationalism' which deals with multinational enterprises and the extent to which non-Canadians may participate in various commercial and industrial activities. The book concludes with a chapter on 'The Perspective of the Legal Adviser' by J. A. Beesley, Director General of the Bureau of Legal Affairs and legal adviser to the Department of External Affairs, and finally a summary of 'Canadian Approaches to International Law' by the three editors.

In reviewing a book of such scope, it is difficult to make observations of general application, yet perhaps invidious to comment on particular essays. In their final chapter, the editors remark upon 'the non-existence of a Canadian academic style in international law', and this is certainly reflected in the ways in which the contributors



to the book have tackled their subjects. Some topics are approached theoretically, others in more practical terms; some are treated historically, whereas other chapters are concerned purely with current practice or even with probable future developments; some are almost entirely devoted to Canadian practice, whereas others bring it in rather as an afterthought at the end of a general discussion; some cover in a few pages subjects to which a conventional text-book would devote a large amount of space, whereas others discuss particular problems in considerable detail. Thus the chapter on 'The Private International Law System', by W. R. Lederman, is almost wholly theoretical and even speculative, whereas that on 'Canadian Treaty-Making', by A. E. Gotlieb, is a strictly practical and business-like account of Canadian practice, with statistical tables concerning numbers and types of treaties, the parties to them and their subject-matter. A middle, and perhaps ideal, course is adopted in 'Immigration, Extradition and Asylum in Canadian Law and Practice', by L. C. Green, who gives a brief but thorough exposition of the principles of law on these subjects before considering their implementation in Canadian practice. S. Joshua Langer's chapter on 'International Leases, Licenses and Servitudes', although much shorter, follows the same pattern—and contains a fairly devastating attack on the idea of international servitudes. By contrast, the chapter on 'Canadian Approaches to the Seabed Regime', by G. W. Alexandrowicz, is mainly concerned with the recent work of the Seabed Committee of the United Nations and the part played by the Canadian delegation therein, so that the continental shelf receives only a brief mention here and just over a page in L. H. J. Legault's chapter on 'Maritime Claims'. On the other hand, 'Canada and the Law of International Drainage Basins', by C. B. Bourne, gives a detailed history of relations between Canada and the United States on this subject, but, interesting though it is, one cannot help feeling that thirty pages is a disproportionate amount of space to devote to this topic, especially when it is followed by a further twenty-two pages on 'Le Régime juridique des Grands Lacs', by Charles Bédard, and yet another twenty-two on 'The International Joint Commission and Canada-United States Boundary Relations', by F. J. E. Jordan. At the other end of the scale, M. D. Copithorne deals with the whole of 'State Responsibility and International Claims' in twenty-two pages; the treatment of many aspects of this subject is cursory (there is, for instance, only a brief reference to the local remedies rule), although lump sum settlements are considered in some detail.

It may seem carping to list omissions when so much is included, but for the sake of completeness it might have been desirable to include chapters on State succession (surely there is something to say on this subject in relation to a State which has emerged from colonial and dominion status to full independence or, if that is now ancient history, on Canada's relations with newly-independent States?), and on the nationality and citizenship laws of Canada, which would have made other chapters more intelligible to the non-Canadian reader. Furthermore, a general survey of the principles of jurisdiction might have been of value (specific issues are, of course, mentioned in many of the chapters)—and in a Canadian book one might expect to find more about *The I'm Alone* than a passing reference in one of the introductory chapters.

This, however, is not a digest of Canadian practice, nor does it purport to be a text-book of international law; in the latter respect, indeed, Canada is already well served by Professor Castel's *International Law chiefly as interpreted and applied in Canada* (1965). Many of the chapters in the last part ('Canadian Participation in International Organizations') are not so much concerned with law as descriptive of organizational techniques, and there is less concentration on the purely legal aspects than one finds in

relation to similar subject-matter in *International Law in Australia* (1965), the smaller and more cohesive volume edited by Professor O'Connell. But if Professors Macdonald, Morris and Johnston have allowed their contributors a looser rein, what is lost in uniformity of treatment may be gained in variety and the demonstration of a wealth of legal scholarship. The editors, in their final chapter, seem unduly conscious of the relatively late development of the study of international law in Canadian universities.

Apart from the style and standard of the academic pursuit of international law in Canada, the main concern of the editors in their final chapter is the attitude of the Canadian Government towards international law, and the part played by international lawyers in advising the Government and in developing a 'national philosophy' of international law. The editors state frankly of Prime Minister Trudeau that they 'are doubtful of his essential commitment to legal solutions' and that he 'seems often to have emphasized economic arguments, while introducing legal rationales only to the extent that they provide a convenient supplementary argument'. They consider that 'There does not appear to be much interest in the development of a legal regime as such. While international lawyers of the highest calibre are available in the public service, we conclude that they are called on to employ their talents in a somewhat narrower range of issues than in past years and are more frequently used as adjunct-technicians after policy has been discussed and settled on non-legal bases.' To remedy this state of affairs, they recommend the establishment of a special research unit to be attached to the Department of External Affairs 'with wide-ranging responsibilities for identification, clarification, and analysis of problems of long-range interest to Canada'. To deal with shorter-range problems they recommend, perhaps somewhat idealistically, that 'the legal adviser and the director general of the Bureau of United Nations Affairs be requested to appear at least once a year before the Cabinet Committee on External Affairs and Defence in order to review the major issues in international law and organization pertinent to the formulation and execution of Canadian foreign policy'; that a monitoring procedure be established to examine draft regulations and bills for possible inconsistency with international law; and that a national advisory committee to the Department of External Affairs be established, 'which would be composed of international lawyers as well as other kinds of specialists on foreign policy problems'.

The concern of the editors on this matter has, no doubt, been heightened by the trend towards unilateralism in recent years (a policy defended by L. H. J. Legault in his essay on 'Maritime Claims' at pp. 390-4), of which the most striking example in Canadian practice is the establishment in 1970 of the 100-mile Arctic anti-pollution zone. It is perhaps unfortunate that the author of the chapter on 'The Arctic Waters in Relation to Canada', Donat Pharand, did not discuss the question of pollution because he had already written an article on that subject (in the *Texas Law Journal*, 7 (1971), p. 45). But his conclusion that the Arctic Ocean constitutes high seas is presumably unacceptable to the Canadian Government, since it is opposed to a statement by Prime Minister Trudeau quoted at p. 444. The Government receives another rap over the knuckles in John Humphrey's chapter on 'The Role of Canada in the United Nations Program for the Promotion of Human Rights' for its failure to pursue a sufficiently positive and vigorous course in this matter. This is characteristic of the forward-looking approach of many of these essays and their attempt to influence governmental as well as academic thinking. At the same time, the emphasis on current issues and attitudes may mean that the volume will date quickly. The editors, in their Introduction, refer to 'incipient obsolescence with respect to chronological details';



it is the present reviewer's opinion that the essays which are historically based will stand the test of time better than those which concentrate upon presently important but possibly transitory issues.

It may be wondered what peculiarly Canadian features are apparent from this enterprise. To the non-Canadian reader two are striking: the problems created by a federal system, and what may perhaps fairly be described as the love-hate relationship of Canada with the United States. The former element is naturally particularly prominent in the essays comprising Part I of the volume, but recurs in many other contexts; some discussion of the way in which other federal States have resolved the problems posed by their constitutional nature might have been enlightening. The latter element has to some extent affected almost all aspects of Canadian practice in international law, but especially territorial and maritime issues and defence.

A few minor points may be made on the presentation of the volume. Some maps would be helpful, especially to illustrate the navigation of the Northwest Passage, of which Donat Pharand gives a fascinating account, and in the chapters on the boundary with the United States. Tables of statutes and treaties would make the book a more useful reference tool, as would a more detailed index; the existing one, described as 'bilingual', in which the essays are indexed in the language in which they are written, makes curious reading.

The editors are to be congratulated on the conception and production of so wide-ranging a volume, which will undoubtedly be of great use to those who study and those who apply international law.

C. A. HOPKINS

*The European Communities and the Rule of Law.* By LORD MACKENZIE STUART. London: Stevens & Sons Ltd., 1977. xii+125 pp. £1.95 paperback.

In 1977 the Hamlyn lectures were for the first time devoted to the law of the European Communities and were delivered by Lord Mackenzie Stuart, the Scottish judge on the Court of Justice of the European Communities. The present book contains the text of those lectures.

The book is addressed to a non-specialist audience, and the author makes no apology for the fact that his lectures 'traverse ground familiar to the expert' (p. 4). And yet he sheds a new light on many problems which are familiar to the expert. On the other hand, one suspects that some non-specialist readers will find it hard to keep up with the author as he leaps nimbly from subject to subject, with a minimum of explanatory detail. The absence of an index and table of cases, and the grouping of footnotes at the end of each chapter, add to the difficulty of finding one's way about the book.

There is a tendency for non-legal writers on the European Communities, at least in the United Kingdom, to understate the role played by law in the life of the European Communities, partly because they often assume that law does not become relevant until a case comes before the Court of Justice of the European Communities. Legal writers are often equally guilty of overstating the role played by law and by the Court. Lord Mackenzie Stuart has found the golden mean between these two extremes. He is fully aware of the interplay between law, politics and economics, but, precisely because he understands the political and economic issues involved, he realizes that the judge should not venture too far into fields which are not his own. To interpret the law (a process which sometimes includes filling gaps in the law), the judge must understand



and seek to give effect to the political and economic objectives of the legislator, but he must not substitute his own policies for those of the legislator.

On some other points the author's statements are less qualified than they should be. With the passage of time, it is easy to forget how epoch-making was the Court's decision in *van Gend en Loos*, and the author is right to remind us of its importance, but he hardly mentions the conditions laid down by the Court which have to be satisfied before an article of the E.E.C. Treaty can be regarded as having direct effect in the sense of creating rights and duties for individuals. Similarly, while the author rightly stresses the influence of the legal traditions of the member States on the law of the Communities, particularly in the sphere of administrative law (although he probably understates the influence of German law in recent years), he pays little attention to the relevance of international law. It is true, as the author says, that the law of the European Communities differs from ordinary international law in its prohibition of reprisals, its provision for compulsory judicial settlement, and its greater readiness to create legal rights and duties for the individual; but when the Court of Justice of the European Communities affirms the supremacy of Community law over national law, or when it borrows general principles of law common to the laws of the member States, it is copying, *mutatis mutandis*, the way in which international tribunals have acted for generations, and writers on Community law ought to acknowledge its debt to international law.

MICHAEL AKEHURST

*Beiträge zum internationalen Privatrecht.* By F. A. MANN. Berlin: Duncker & Humblot, 1976. 400 pp. DM 96.

To the readers of the *British Year Book of International Law* Dr. F. A. Mann needs no introduction. They know him as one of the most distinguished expounders of public and of English private international law, and, more particularly, as an explorer of the labyrinthine areas in which these two disciplines meet. What many of them may not know is that, through many years, he has performed similar services for the law of the Federal Republic of Germany, and indeed fulfilled the arduous task of living in two very different legal systems at the same time. The fruit of this successful effort is a voluminous and very important series of contributions to German legal periodicals and *Festschriften*, some small, some almost reaching the size of a book. It was a happy thought to collect a number of the major articles in this volume. They were published in the course of a quarter of a century, the earliest in 1950, the latest in 1975, and many of them are topical in the sense that they seek to analyse the impact of contemporary developments, and especially of contemporary political and economic catastrophes on the traditional law. The law in question is that of the Federal Republic, but, whilst moving within its boundaries, the author has made full use of his unique opportunities as an expert in two systems, and of the power of detachment which a lawyer enjoys who combines the skills of a practitioner and of a scholar in both.

Perhaps Dr. Mann could not have reached the same depth of penetration and sovereign command of the relevant material—legislative, judicial, doctrinal—if the range of his interest had been more comprehensive. The work consists, as its title indicates, of contributions to private international law, but it concentrates mainly on problems of property, contract and corporation law. What one may call the human side of the conflict of laws and of jurisdictions (and especially the international aspect of family

law) is outside its scope, except for two early (1956) articles on habitual residence and on compulsory naturalizations (Chapters 2 and 3). Nor does the author show any particular interest in what one may call the 'general' problems of private international law. This remark, however, is subject to a major qualification. The first of the 21 papers which are reprinted in the volume is an outstandingly important (and very recent, 1974) analysis of the difference between genuine conflict of law rules and self-limiting statutes. It is very regrettable that this is inaccessible to British lawyers who cannot read German: this paper amplifies the contribution on a similar topic which Dr. Mann made to the *British Year Book* in 1972-3 (p. 117). The bulk of the work deals with corporations, with the effect of confiscations and other governmental measures, with various aspects of the law of contract, with currency problems and with arbitration. Much of it, and especially perhaps the very recent (1975) discussion of the conflicts aspect of uniform sales legislation (Chapter 14), the two articles of 1953 and 1970 on the Bretton Woods Agreement (Chapters 18 and 19) and the highly important piece on the relation of international commercial arbitration and domestic law (1968, Chapter 20) have, despite their German context, an immediate interest for English specialists.

Dr. Mann emphasizes in the Preface that he is proud to be a 'traditionalist'. No one who has read this book can doubt that he is. His belief in the possibility of a neat separation between 'legal' and 'political' arguments and in the political 'innocence' of the 'pure' lawyer is genuine and perhaps enviable. He is convinced that there are no political overtones in his intricate and ingenious arguments on matters such as the effect of State succession on corporate persons or the confiscation of membership rights and their international effect (Chapters 6 and 7). He would consider an argument in favour of the right of an Austro-Hungarian company, after the establishment of the Republic of Czechoslovakia, to transfer its seat from Prague to Vienna as a legal argument based on the *lex societatis* chosen by the 'will of the founders' of the company (pp. 96 f.). He would probably reject as 'political' an argument derived from the contribution the corporation as an economic entity has made in the past and was expected to make in the future to the life of the area in which it has so far exclusively operated. 'The law of the successor state must be left out of account.' A strong policy to protect private property rights against the consequences of political events or actions can, in this view, never be a 'political' policy. This fundamental belief, without being discussed or even articulated, underlies the chapters which deal with corporation law, and with confiscations.

The combination of expertise in public international law and in the conflict of laws stands the author in good stead whether he writes in England or in Germany. In this respect the papers on contracts made by States and other 'persons in international law' with each other or with natural or 'domestic' corporate persons (Chapter 15) and on the significance of international law in litigation (Chapter 21) though of somewhat ancient vintage (1962, 1950) retain their great importance.

Anyone familiar with the German language must admire the author's legal style. It is a sheer pleasure to be carried along by his crystal-clear reasoning expressed in a crisp language free from circumlocution or uncalled-for emphasis. He masters the German method of argument (and use of literature) without succumbing to the use of turgid clichés all too frequent in contemporary German (and not only German) writing. His traditionalism is, in matters of style, a pure virtue.

Having now published collections of his papers on public international law in English (*Studies in International Law*, Clarendon Press, 1973) and on private inter-



national law in German, when will Dr. Mann let us have a volume with his significant essays on the conflict of laws in England?

O. KAHN-FREUND

*Investment Insurance in International Law.* By THEODOR MERON. Dobbs Ferry, New York: Oceana Publications; Leyden: A. W. Sijthoff, 1976. 960 pp. Dfl. 175 or U.S. \$67.50.

The author, Ambassador of Israel to Canada and Visiting Professor of International Law at the Universities of Ottawa and New York, is well known to British international lawyers on account of his many learned contributions. He has now produced a very large volume which includes 141 pages of text and almost 800 pages of Annexes. The first two chapters of the text reproduce articles which were published in the *American Journal of International Law*, 68 (1974), p. 628, and this *Year Book*, 47 (1974-5), p. 301, respectively. They deal with international law *stricto sensu*, viz. the law of diplomatic protection in regard to insurers and insured and the World Bank's treatment of investment insurance. The remainder of the text is primarily concerned with municipal law, for the author describes and analyses national schemes of investment insurance. The most detailed discussion is not unnaturally devoted to the law of the United States of America (Chapter V), but there are also Chapters (VI and VII) on Canadian and British investment insurance and in the Annex (p. 279) one also finds a Congressional report of 1973 on investment insurance practices in Germany, France, Sweden and the United Kingdom. For the rest the Annex includes numerous and variegated documents such as arbitral awards, decisions, Investment Guaranty Treaties, forms of application and so forth.

The specialist practitioner will find this work extremely useful, for it supplies him with a collection of material which is not readily available and is likely to provide much-needed guidance, though each scheme of investment insurance is to a large extent embedded in its own system of municipal law. The great disadvantage of the work is that it is unacceptably heavy. By some rearrangements and some changes in the reproduction of documents in the Annex the weight could have been considerably lightened.

F. A. MANN

*The Influence of Law on Sea Power.* By D. P. O'CONNELL. Manchester: The University Press, 1975. xv+204 pp. (including bibliography and index). £6.50.

This volume was the basis for the Schill lectures delivered in the University of Manchester in 1974. A foreword is contributed by Vice-Admiral Sir Peter Gretton.

The contents of the work are not easy to summarize, not least because a great deal of material is presented within the pages of an apparently small book. It is a most original and helpful study of matters which are too often neglected. The subject is the interaction of developments in naval strategy and weapons, on the one hand, and the law of the sea, on the other hand. The episodes particularly considered include the Spanish Civil War, the Battle of the River Plate, the *Altmark* incident, and the Cuban missile crisis. The treatment involves the weaving together of naval practice and strategy, operational orders, diplomatic history and international law. The outcome is



a two-fold contribution. In the first place, numerous points of legal substance are considered. Secondly, the precise manner in which the law is taken into consideration, both at the operational and staff planning stages, is examined and illustrated. This aspect of the book is the more original and depends upon Professor O'Connell's exceptional qualifications as a lawyer, historian and naval reserve officer with an understanding of modern naval operations and weapons systems. A further quality of the treatment is the more or less incidental exploration of the relations of the 'law of war' and the law of the sea in time of peace.

There are some reservations to be stated, though these do not detract from the positive contribution which Professor O'Connell makes. In places the extrapolation of practice or principle from the 'facts' is too abrupt and intuitive to be convincing. Again, the economy of the narrative sometimes results in a lack of clarity. A more substantial point of criticism is the lack of explanation of the relations between the naval planning and operational consideration of the law, in terms of crisis management, and the policy-making at the diplomatic level. In the discussion of the Cuban missile crisis the general policy-making background is more or less neglected in spite of the useful account provided by Abram Chayes in his book, *The Cuban Missile Crisis* (Oxford University Press, 1974), which is omitted from the bibliography.

In general the reader is impressed by the sturdy account of the use of the law to induce courses of action but the suspicion lingers that the law tends to be relegated to a realm of ambivalence not far removed from opportunism. The balance of realism and legality, or principle, is admittedly difficult to achieve.

IAN BROWNLIE

*Commonwealth International Law Cases*. Compiled and edited by CLIVE PARRY and J. A. HOPKINS. Volumes I and II—*States as International Persons*. Dobbs Ferry, New York: Oceana Publications, 1975. Volume I, 504 pp., \$40; Volume II, xv+497 pp., \$40.

These are the first two volumes of a projected ten-volume series which will complement the learned editors' *British International Law Cases*, reproducing photographically a selection of decisions on questions of International Law of 'courts of countries at any time belonging to the British Commonwealth overseas'. Volume I deals with general aspects of the topic 'States as International Persons' (existence of the State: proof: beginnings of the State's existence; sovereignty and independence). Volume II deals with composite and dependent States and recognition.

Although the publishers claim that, together with *American International Law Cases* and *British International Law Cases*, the series 'will complete coverage of the International Law cases of the English-speaking world', this is, disappointingly, not quite accurate. In the first place, some important topics will not be dealt with, since the coverage is limited to: States as international persons; State territory; jurisdiction; the individual in international law; diplomatic and consular agents; and treaties. Secondly, with very few exceptions, no case will be included which is reported in full in the *International Law Reports*. In particular, this means the omission of *Madzimbamuto v. Lardner-Burke*, one of the cases which any publicist or legal theorist would wish to take to the proverbial desert island. Space is often a problem in such publications, but perhaps at least a few more cases could have been printed had the ones which have been included been pruned with slightly greater vigour. And if this was not expedient, it would at any rate have been helpful to have had a clear indication of precisely which cases have had

to be omitted. Still, it is perhaps a tribute to the skill of the editors that they can so whet the appetite of a reviewer that he grumbles that the banquet is not larger.

The banquet which is offered by the first two volumes is more in the Chinese than the European style. That is to say, instead of relatively large dishes, we are served with a great number of smaller, but interesting and tasty, morsels. As Professor Parry himself points out, many of the cases are 'the decisions of tribunals sitting in countries which for the most part have acquired independent status only in very recent years, and whose concern with questions of international legal import has necessarily been very limited indeed until the very latest times. Nuggets of pure international legal gold are not to be expected to lie undiscovered in the reports of the proceedings of inferior Indian courts in the mid-nineteenth century'. Nevertheless, some of them do contain interesting discussions of, or new ways of looking at, perennial problems, and many offer fascinating, though not always edifying, insights into Imperial history (see, for example, *R. v. Tunkoo Mahomed Saad*, reported in Volume I at page 31).

The section or sections of the series dealing with State succession promise to be particularly useful, and this reviewer looks forward to the appearance of the remaining volumes with interest.

MAURICE MENDELSON

*Malteserorden und Völkergemeinschaft.* By ROBERT PRANTNER. Berlin and München: Duncker & Humblot, 1974. 256 pp. DM 48.60.

The Order of Malta intrigues international lawyers, and a surprising number of monographs have been written analysing its claims to sovereignty. None has rejected them. A few facts will put the question in issue: the Order is the fourth oldest religious order of Christendom; it has survived for over 900 years, and today is more vigorous and influential than at any time since the 17th century; it was represented at the peace conferences of Westphalia, Nymwegen and Utrecht; it maintained diplomatic relations unbroken with the Holy See and Austria after it lost Malta to Napoleon; it resumed them with Napoleon in 1803; whereas before 1914 it exchanged embassies with only two countries, today it maintains diplomatic relations with over forty governments (with more in the queue) and seven intergovernmental organizations. Of these, thirty-five are at ambassadorial level; two are Islamic States, one is a Communist State and seven are African States; after the loss of Malta it made a treaty with Bavaria, and since 1953 has entered into treaty relations with nearly twenty European, African and Latin American States; it is a direct beneficiary of the Red Cross Conventions; its Italian property is extraterritorial and Italian courts have affirmed its separate status; it has issued passports to refugees and issues them to its officers; it ran 30 ambulance aircraft recognized as extraterritorial by the Allied Military Government in Italy, and has operated them in Vietnam and Biafra, wearing the Order's insignia.

Perhaps because he would regard it as quite anomalous, considering these facts, Dr. Prantner does not mention that the British Government does not recognize the Order. This is ostensibly because the Order is not an intergovernmental organization, nor a State, and its claims to sovereignty are unsupported by the government of territory. It is odd, because the British Government acknowledged the Order's status in the Treaty of Amiens, 1803, and maintained relations with it until the Congress of Vienna. The loss of Malta in 1798, therefore, cannot of itself, in the eyes of the British Government, have occasioned the demise of the Order's sovereignty.

Sovereignty is a shorthand word. It may convey the notion of territorial sovereignty,



but, like 'personality', it indicates faculties which may not necessarily be uniform. Dr. Prantner's analysis leads him to describe the Order as a 'supranational organization'.

Dr. Prantner's book is a thorough, up to the minute, study of the Order's role and activities, and as such it goes beyond the usual international legal treatment of the subject. But perhaps because this is not essentially a legal work, the author does not grapple with the problem of the Order's sovereignty as one of jurisprudence. He recites a large number of juristic statements, legal opinions given to the Order by well-known international lawyers, and decisions of courts, all affirming the Order's status in international law. But he glosses over the difficulties posed by, for example, Kunz's distinction between persons in general and in particular international law.

Particularly interesting is Dr. Prantner's recitation of the facts concerning the Order's humanitarian work. It maintains hospitals, leprosaria and ambulance corps in sixty-six countries. It has provided ambulance corps in every major European war since 1864, and in World War I handled about one million wounded. In Biafra in 1967 and in Vietnam the French and German Associations respectively operated hospitals and ambulance aircraft under the Order's insignia. In Vietnam this was done under a special treaty between Germany and South Vietnam, under which the former financed the Order's operations and the latter recognized that the German Association came under the Order's independence and neutrality under the Red Cross Conventions. After a time the Vietcong gave similar recognition.

The anomalous attitude of the British Government towards the Order could only deprive the British Association from mounting similar relief operations with the same independence, and one wonders what advantage the Foreign and Commonwealth Office sees in rigid adherence to a theoretical notion of sovereignty that is, by all standards, a minority one. The special position of the Venerable Order may have something to do with this, but since the joint declaration in 1951 of the Duke of Gloucester acting for the Venerable Order and the Grand Chancellor of the Sovereign Order on fraternity (which Dr. Prantner does not mention), the need to protect this position is not so evident.

It may be, too, that the Office sees difficulties in the Order's status as a religious Order with a relationship with the Holy See. This relationship is thoroughly discussed by Dr. Prantner, and he shows that the link is through the Constitution of the Order, which specifies canon law as one of the sources of law to be applied in the Order's courts. The reach of the Holy See is thus through the sovereignty of the Order itself, and there is nothing anomalous in international law about that (perhaps the position of the Australian States in relation to the Westminster Parliament is analogous). The Cardinal Protector is regarded, not as a superior, but as a diplomatic representative (there were Cardinal Protectors to Catholic monarchies). Both the Holy See and the Italian Government proclaim the Order to be an international legal person.

As Dr. Prantner's thoroughly researched and well-organized book indicates, it really is time that the British Government took another look at the question.

D. P. O'CONNELL

*Der internationale Richter im Spannungsfeld der Rechtskulturen.* By LYNDEL V. PROTTR. Tübinger Schriften zum internationalen und europäischen Recht, Band 2. Berlin: Duncker & Humblot, 1975. 257 pp. DM 68.

This book has its origin in the criticism to which the International Court of Justice was exposed after the *South West Africa* cases. The author, an Australian international



lawyer, has given a short analysis of the judicial reasoning of the Court in *Revue belge de droit international*, 1967; she now enquires into the sociological and psychological factors governing the activities of an international judge. She dwells in particular on the multinational, and multicultural, composition of the audience and of the International Court, and on the manifold expectations which arise from this fact. The author thinks that the Court could do more to meet the exigencies which result.

All this is interesting reading, the more so as the author does not forget that the function of law is not fully explained (and cannot be explained away) by a psychoanalysis of the judge. Moreover, she has tackled the metajuridical problems in her earlier writings.

The reviewer would, however, prefer not to go into details, and not to enter a discussion of the propriety of interviewing judges and formulating recommendations—that is what Lillich and White have also done on the technicalities of the Court's procedure (*American Journal of International Law*, 1976). Rather he would view the problem in relation to the strangely diminished role of law in modern international relations. Of course, there are certain current misconceptions. For one, many people forget the mass of routine applications of international law between States, or rather Foreign Offices, of equal standards of legal training, which is so self-evident as to engender no publicity at all. Secondly, we may remember that those States which have survived the colonization era had adopted Western international law, and even received European codifications of branches of national law. Judges from the Far East have sat in the P.C.I.J., and there appear to have been no difficulties of mutual understanding. Whatever might have been the aversion to legal proceedings and to legal reasoning in Eastern cultures, eastern lawyers coming to the Occident seem to have integrated themselves into Western legal thinking. Nagendra Singh shows that 'the concept of legal regime' is not foreign to his own legal heritage (*Essays in honour of Krishna Rao*, 1976), and he sounds quite conservative when he says that the essential function of any system of law is to promote the maintenance of order and to assist in the administration of justice (loc. cit., p. 21). As to the material tenets of international law, Gould and Barkun think that 'most international norms do not require transformation of substance in order to attain an intercultural quality' (*International Law and the Social Sciences*, 1970, p. 223).

If this were true, the problem of the author would not in itself be insuperable. On the other hand, Bozeman (*The Future of Law in a Multicultural World*, 1971) holds that the differences of view on the role of law are too deep; then we ought to abandon the pursuit of such a hopeless experiment as world peace through world law.

The reviewer, however, would point to the fact that recourse to arbitration and judicial proceedings is far more frequent than recourse to mediation, and has been so for long. What prevails now is the rather bad habit—let us hope a transient one—of bringing disputes before the United Nations, with the hope of gaining the support of a turbulent majority after discussions in which neither the facts nor the law of the case receive serious consideration—in contrast to the League of Nations which at least tried earnestly to clear up the issues. The consequences are that seldom are disputes really settled and that the list of unsettled cases, now appearing at the end of the annual report of the Security Council, does not sensibly diminish.

Neither international law nor international jurisprudence are immobile. The Permanent Court dealt with only seven cases concerning general law (out of twenty-two), and among its twenty-seven advisory opinions only one. The reviewer is not aware that the Permanent Court, a more traditional body than the present Court, has

incurred the same amount of criticism for its handling of the new international law issuing from the Peace Settlements of 1919. Nor did the numerous Mixed Arbitral Tribunals, apart of course from the normal dissatisfaction of the losing party, and perhaps also in the case of the *Hungarian Optants*.

The present Court seems to have its docket equally divided between customary law and new law. Perhaps this may make a difference, but an analysis of the role of international jurisdiction must also consider the problem of unfulfilled expectations on the part of States going to court. If they have got into the habit of taking their disputes into a political arena, hoping to muster partisan support, they are wrong to seek a binding settlement from an impartial body. Like an individual within a State, States submitting to international jurisdiction cannot expect but to have their acts and positions valued in the light of the existing order. This order may differ from the order existing ten years ago, but still the expectation of the outcome of the proceedings must be founded on the anticipation of legal reasoning.

If and when international relations get back to the idea of objective order and the Hague Court is called upon to play a more prominent role, the author's remarks will certainly be useful, especially where she pleads against deciding cases on mere technicalities—and in this connection she could have cited the *Nuclear Tests* cases. Consequently, it is good to know that an English text of this work is in preparation. This venture will enable Dr. Prott to correct a small error of substance. The judges of the Permanent and of the present Court have always given their votes in the inverse order of seniority, so that their personal independence has not been subject to considerations of prestige.

F. MÜNCH

*The International Law Commission.* By B. G. RAMCHARAN. The Hague: Martinus Nijhoff, 1977. xvi+210+(bibliography, index) 17 pp. Gld. 57.50.

The International Law Commission has played a major role in the codification and progressive development of international law in the last thirty years. There are obvious advantages to be gained from codifying customary international law in a treaty: the rules become more precise and more accessible, and new States are more willing to accept rules which they themselves have helped to draft. Similarly, the 'progressive development' of international law enables rules of international law to be adapted to meet the aspirations of the large number of newly independent States. It is therefore particularly fitting that Dr. Ramcharan, a scholar from one of the newly independent States (Guyana), should be the author of this book, which is based on his London Ph.D. thesis.

The author makes a detailed and scholarly analysis of the way in which the Commission has operated to date. His approach is often rather abstract and philosophical, and occasionally over-optimistic; for instance, he argues on p. 34 that the increasing politicization of elections to the Commission produces advantages which outweigh the disadvantages; and he suggests that the scope of the Commission's work should be widened to include topics such as the law relating to economic development, although some readers may wonder whether a body of lawyers is really qualified to deal with issues where political and economic problems overshadow legal problems. However, the author also makes wise suggestions for accelerating the work of the Commission, e.g. by supplementing the production of draft conventions by producing a larger number of 'restatements'; at the same time, he warns that greater use of the 'restate-



ment' method will require the Commission to make a sharper distinction than it has done hitherto between codification and progressive development (p. 105), and he points out that the Commission can only work effectively if it works by consensus and that the process of reaching a consensus usually takes a long time (pp. 39-40).

One wishes that the author had given fuller attention to some topics, such as the relationship between the work of the Commission and the general theory of the sources of international law; for instance, he says on p. 19 that 'a conventional provision will, as between two parties for whom it is in force, take precedence over a pre-existing rule of international customary law'—a statement which calls both for qualifications and for supporting authority, but which receives neither. The proof-reading also leaves something to be desired. Nevertheless, despite these defects, the author is to be congratulated on making a valuable contribution to our understanding of one of the most important developments which have occurred in international law in the past thirty years.

MICHAEL AKEHURST

*Droit public et droit privé dans les relations internationales.* By F. RIGAUX. Paris: Éditions Pedone, 1977. 444+(list of abbreviations, index and table of contents) 42 pp.

It is the first duty of any reviewer to describe the subject-matter of the book which he is reviewing; but that is not easy in the case of a book as far-ranging as the present one. However, at the risk of over-simplification and distortion, the main themes of the book can be summarized as follows: the distinction between public law and private law is becoming increasingly blurred; the distinction between public international law and municipal law (especially private international law) is becoming increasingly blurred; and these blurrings are particularly noticeable as regards the activities of so-called multinational companies. Woven into these main themes are discussions of a host of separate issues; for instance, the first forty pages deal with (*inter alia*) diplomatic protection, 'sanctions' against Rhodesia, oil pollution, concordats and limping marriages. Inevitably, there is a certain lack of unity and occasional superficiality (e.g., pp. 75-82 on unrecognized States and governments). But the author does not aim to deal with all topics in their entirety, but only with particular aspects of them and from a particular point of view. In this way he throws a new (and often controversial) light on many of them; and both public international lawyers and private international lawyers will find much of interest in this book.

Like Charles de Visscher, his predecessor at the University of Louvain, Professor Rigaux is particularly interested in the reality which lies behind the theory—for instance, in the unstated reasons rather than the stated reasons for judicial decisions. Why is it, for example, that courts in France are far more reluctant to recognize foreign expropriations than courts in the United States? The author suggests (p. 359) that the reason is that the United States is strong enough to compel foreign governments to pay compensation by diplomatic pressure, and that France is too weak to do so; consequently, protection of expropriated owners falls to the courts in France and to the State Department in the United States. The present reviewer is not wholly convinced by this suggestion (France succeeded in persuading Cuba to pay compensation for expropriated property, and the United States failed); but the suggestion is thought-provoking, and typical of many which are to be found in this book.

MICHAEL AKEHURST



*Digest of United States Practice in International Law 1974.* By ARTHUR W. ROVINE. Washington: U.S. Government Printing Office, 1975 (Department of State Publication 8809). xxii+796 pp. *Digest of United States Practice in International Law 1975.* By ELEANOR C. McDOWELL. Washington: U.S. Government Printing Office, 1976 (Department of State Publication 8865). xxiii+947 pp.

These volumes continue the venture which began with the volume for 1973, reviewed in this *Year Book*, 47 (1974-5), p. 487. The standard of production is high and each volume is well indexed. The general character of the survey is now established. Whilst there is a certain proportion of material in the form of pronouncements on technical aspects of general international law (see, for example, *Digest*, 1974, p. 700, on reprisals), what is provided is a documentation covering almost the entire spectrum of United States views and initiatives on the international plane, including legislative and judicial material affecting international law and foreign affairs. The outcome is somewhat removed from the usual conception of 'practice in international law'. None the less the compendium of materials has considerable value in providing a conspectus of developments over a wide field. The inclusion of the text of key items, such as General Assembly resolutions, as *res gestae*, is of great assistance. The 1974 volume includes materials relating to the Charter of Economic Rights and Duties of States, recent Investment Guarantee Agreements, the Overseas Private Investment Corporation, the principle of non-intervention, environmental affairs, human rights, the Department of State Revised Circular on procedures of treaty-making, economic sanctions and the role of the International Court. Both volumes cover important multilateral conferences. The series is an invaluable work of reference, constituting a sophisticated index to international legal relations in general.

IAN BROWNLIE

*The Legal Aspects of the Namibian Dispute.* By ITSEJUWA SAGAY. Ile-Ife, Nigeria: University of Ife Press, 1976. xxxii+342 pp.+appendices, bibliography and index. £8.50.

As the title suggests, this is a study of Namibia, rather than South West Africa. The author is primarily concerned with the revocation of the Mandate by the United Nations and in particular with the justification and consequences of that act.

To introduce and support his contention that the United Nations had the power to revoke the Mandate and was justified in doing so by South Africa's conduct, the first section of the book examines the political background of the Mandates system, the legal nature of the Mandates and the practice of the League. This is followed by a discussion of the transition from the League to the United Nations and the status of South West Africa in the post-war period. The core of the book is a detailed analysis of South Africa's conduct in the territory both before and after the war and a close analysis of the legal basis and effects of the revocation resolution. The final chapter examines various ways of securing South Africa's withdrawal. Six appendices set out the provisions of the Mandate, the revocation resolution and other relevant documents and describe recent developments in the territory. The book is very well organized and the author's arguments are clearly presented and thoroughly documented. There is a substantial bibliography of scholarly work in English and comprehensive notes at the end of each chapter.

The author dedicates his work to 'all freedom fighters' and to 'the oppressed people of Namibia' and makes no attempt to hide his sympathies. But, though this is in no sense a partisan tract and is indeed generally persuasive, the author's desire to damn South Africa has on occasion prevented him from seeing both sides of the question, or fully appreciating the complexity of the issues. The interpretation of Article 80 of the Charter, for example, and the question of how far South Africa's actions in the immediate post-war period indicated her consent to United Nations supervision of the Mandate are both more controversial than the author suggests. Likewise, the notion of the Mandate surviving without the arrangements for judicial supervision is by no means as absurd as he appears to believe. Moreover, it is surely misleading to discuss the issue of revocability without mentioning that when the Mandate was devised a proposal to include a provision expressly providing for revocation was specifically rejected. In the same way to refer throughout to 'the Mandate agreement' begs the question of the treaty character of the arrangement, an issue which was crucial in both the 1962 and 1971 cases and which once again reference to the *travaux préparatoires* would have done much to illuminate.

In several places the arguments presented are mistaken or misleading. The statement that in 1966 the Court decided that the legally protected interests of Ethiopia and Liberia in South West Africa 'were limited to the protection of any missionaries of their respective nationalities who happened to be practising their calling in the territory' (p. 88) is wrong, because as the Court made clear, this was just one of the national rights in respect of which judicial protection could be invoked. Dr. Bowett is cited as authority for the proposition that the Uniting for Peace Resolution enables the General Assembly to recommend enforcement action, but the same writer's careful discussion of the implications of the *Expenses* case is not. Similarly, the author quotes some observations of Sir Gerald Fitzmaurice which appear to support the argument that the United Nations succeeded to the League's functions in respect of the Mandate, but fails to note that in the passage in question Sir Gerald was merely summarizing the 1950 advisory opinion and that his joint dissenting opinion with Sir Percy Spender in the 1962 case indicated that he totally rejects this view. On the same issue Lord McNair's views on dispositive treaties are quoted to support the argument for succession, but there is no mention of the fact that in his separate opinion in the 1950 case Lord McNair too expressly rejected the idea of continuing United Nations supervision.

Perhaps the most serious limitation in a work which concentrates so closely on events in the International Court and the United Nations between 1962 and 1971 is the failure to recognize that behind the technical arguments the controversy over Namibia raises fundamental questions about the nature of international law and the role of political and judicial institutions. Only if this is understood can one appreciate how it was possible for Sir Gerald Fitzmaurice and others to disagree with the Court's 1962 and 1971 opinions on grounds which really have nothing to do with either the morality of *apartheid* or South Africa's handling of the Mandate.

It follows from what has been said that the usefulness of this book will depend upon how it is used. It presents a clear and well-organized argument and correctly identifies the technical issues on which the question of revocation depends. But the author's tendency to overstate his case means that his book must be regarded not as a dispassionate analysis, but rather as a lucid presentation of the case against South Africa. As such it is a useful addition to the literature.

J. G. MERRILLS



*Evidence before International Tribunals.* By DURWARD V. SANDIFER. Revised Edition. Charlottesville, Virginia: University Press of Virginia, 1975. xiv+519 pp. \$27.50.

When this work originally appeared in 1939, it came to be rapidly, and, in the words of the author, 'widely accepted as the standard reference on the law of evidence by scholars, practitioners and national and international courts, including the Permanent Court of International Justice and the International Court of Justice' (p. xiii). There is indeed very little else that covers the field and certainly nothing that covers it with such care and completeness. It is, therefore, most welcome to have a second edition which, again in the words of the author, 'presents a reassessment, restatement and updating' of the original work.

The book is divided into ten chapters and 117 sections (which, however, are not marked at the top of each page, so that, where a footnote refers to another section rather than page it takes a little time to find it). Beginning with the nature and sources of the rules of evidence Professor Sandifer takes his reader through order and time of the submission, the production and admissibility of evidence, to the types of evidence (documentary and oral), to evidence by interested persons, hearsay evidence and judicial notice (including a particularly valuable section on sovereign assertions) to end up with a long chapter on the esoteric subject of rehearings and revision on the basis of newly discovered or fraudulent evidence. On most questions which arise in practice the book affords reliable guidance. It quotes extensively from the leading authorities in international law, and also makes much use of municipal material such as the incomparable Wigmore.

Yet it is no Wigmore. There are passages which lack the precision of that great work. And there are gaps some of which are not readily explicable. The most important arises from the fact that the book, which repeatedly discusses the principle of the free evaluation of evidence, appears to neglect the great problem of the degree or intensity of proof that an international tribunal requires or should require. Is it necessary to establish facts with certainty? Or to the reasonable satisfaction of the tribunal? Or is it a balance of probability that is sufficient? Is the standard of proof the same in all cases? Is it the same, for instance, where a State has to prove a denial of justice, as in the case in which a rule of municipal law has to be proved?

It is possible that such omissions can be explained by the cursory treatment meted out to the *Case of the Barcelona Traction Light and Power Co.* According to the index the case is referred to twice, although in fact there is at least one other reference to it (p. 17). But that case raised practically every single point relating to evidence and proof that one can think of, though the judgment of the Court and the separate opinions reflect only very few of the points made in the course of the written pleadings and the oral arguments. The latter material has not been used at all, but even the separate opinions have not been fully exploited. Thus Sir Gerald Fitzmaurice's view of Belgium's failure to produce certain documents is mentioned (p. 202), but Judge Jessup's opposition is disregarded; he preferred to invoke 'the common law rule which is to the effect that if a party fails to produce on demand a relevant document which is in its possession, there may be an inference that the document if brought would have exposed facts unfavourable to the party' (paragraph 97). Here is a conflict of substantial importance on which future generations would have welcomed the wise guidance of so great an authority as Professor Sandifer. Or take the very lengthy discussion by Judge Jessup (paragraphs 78 to 105) of the question of whether and to what extent



Belgium had proved the Belgian character of bearer shares issued by Belgian companies. Judge Jessup held that Belgium's evidence had failed to establish the fact. Is there not an enormous amount of highly significant material to be found in these 27 paragraphs? Is it not necessary to deal with the problem of proving national character where bearer shares are issued? Are these passages not highly relevant to the fundamental question of the standard of proof required by international tribunals? Do they apply an appropriate or too strict a standard? It is respectfully submitted that Professor Sandifer's work would have gained greatly if he had come to grips with the wide-ranging and numerous problems of evidence that *Barcelona Traction* raised.

His neglect is the more remarkable as Judge Jessup introduces his book with a Foreword which is unusually interesting. This is not on account of Judge Jessup's repeating the Court's 'mild rebuke' about 'unwarranted delay' in *Barcelona Traction* or on account of his own much sharper reference to 'abuses' by 'the Parties' who are indiscriminately alleged to have introduced irrelevancies and repeated in oral argument what had been presented in writing—comments some (though by no means all) of which the Court and Judge Jessup might have suppressed if they had had to render a decision on the complex merits of the case. What is much more interesting and may easily be overlooked by the general reader is Judge Jessup's remark that in the *Nuclear Test* cases the Court had gone to 'curious lengths' when it made use of 'evidence not proffered by the parties' and brought into existence after the close of the hearings, when it did not find it necessary to afford the Parties an opportunity of submitting argument on it and when it assumed that Australia was not seeking a declaratory judgment. This is mild comment indeed on a decision which made some odd law and offended against many rules, including the principles of a 'fair hearing' enshrined for instance, in Article 6, of the European Convention on Human Rights. But coming from so highly respected an authority as Judge Jessup it is particularly valuable and worthy of being made widely known.

F. A. MANN

*Der völkerrechtliche Status Berlins nach dem Viermächte-Abkommen vom 3. September 1971.* By HARTMUT SCHIEDERMAIR. Berlin, Heidelberg, New York: Springer Verlag, 1975. vi+223 pp.

This valuable work presents a detailed analysis of and commentary upon the Quadripartite Agreement which France, the United Kingdom, the United States of America and the Soviet Union concluded on 3 September 1971 with reference to the status of Berlin (Cmnd. 5135). The book is characterized by great and realistic insight into the manifold legal and factual problems which have existed in Berlin for many years and which the frequently obscure language of the Agreement tries to solve or, more often, not to solve. Thus the Preamble alone contains two phrases which are of the utmost ambiguity: '... Taking into account the existing situation in the relevant area ... without prejudice to their legal positions'. The principal effect is that the problem of East Berlin has been left untouched. That as a matter of fact the Western Allies have no power there continues to be the position, though the alleged legal rights of the German Democratic Republic to treat Berlin as its capital have neither been asserted nor denied. On the other hand the legal thesis that the Western Sectors of Berlin 'continue not to be a constituent part of the Federal Republic of Germany and not to be governed by it' was acknowledged by the four Parties. It is, however, not only the legality (or illegality) of the Berlin situation which the author discusses.

He also investigates the numerous practical implications of some of the Agreement's provisions such as those relating to access to Berlin or to the 'settlement' of disputes. The complaining Party is given 'the right to draw the attention . . . to the provisions' of the Agreement and 'to conduct the requisite quadripartite consultations'. The author treats the right to consultations as a '*pactum de negotiando* which imposes upon all concerned the duty of serious negotiations' (p. 193). One can only hope he is right. It is little enough in any event.

The author does not discuss in detail the legal status of Berlin before the Agreement of 1971, which the Four Powers did not intend to affect and which in some respects may still be highly relevant. But as to the Agreement itself Dr. Schiedermaier's explanations will be an indispensable guide.

F. A. MANN

*International Conventions of Merchant Shipping.* By NAGENDRA SINGH. British Shipping Laws No. 8. 2nd edition. London: Stevens & Sons Ltd., 1973. xx+1,697 pp. £27.

Judge Singh deserves our thanks for having found the time to revise the 1963 edition of this mammoth work in order to bring it up to date. Part I, entitled 'Technical and Operational Conventions', deals with navigation, safety conventions, submarine cables and telecommunications, tonnage measurement of ships, sanitary conventions, and the facilitation of maritime traffic. Part II, 'Employment, Welfare and Status of Seamen', is mainly devoted to the maritime conventions and recommendations of the International Labour Organization. Part III deals with the unification of private maritime law and Part IV with the law of the sea (comprising the 1958 Geneva Conventions on the High Seas and on the Territorial Sea and Contiguous Zone, and a section on 'Marine Environmental Law'), land-locked States, ports, canals and straits. Part V is devoted to international organizations concerning merchant shipping. Details of the parties to the instruments in question are given, together with, in some cases, dates of acceptance and reservations. Some useful background or introductory notes are provided by the learned editor.

It is extremely convenient to have these instruments, culled as they are from a great variety of official sources, collected in one volume, and most helpful to have details of the parties. But unfortunately, through no fault of the editor, the book's utility has been somewhat diminished by the rapidity of developments in this field. A number of important conventions have been concluded, some of them even before the date on which the volume was published (e.g., the Convention on the International Regulations for Preventing Collisions at Sea, 1972, and the London Convention on the Prevention of Maritime Pollution by Dumping of Wastes and other Matter, 1972). Since publication some of the treaties included in the volume, and others not included, have entered into force. And, of course, lists of parties constantly require revision. In short, and even leaving out of account what is likely to emerge from the Third United Nations Conference on the Law of the Sea, the international (conventional) law of merchant shipping has not stood still since the publication of this volume, and is unlikely to do so in the foreseeable future. In these circumstances, one wonders whether the time has not come, if this book is to retain its usefulness, for it to be accompanied by cumulative supplements or, better still, for future editions to be published in loose-leaf form.

MAURICE MENDELSON



*The Evolution of the Right of Self-Determination. A Study of United Nations Practice.* By A. RIGO SUREDA. Leyden: A. W. Sijthoff, 1973. 397 pp. (including appendices, bibliography and index). Dfl. 48.

This study concentrates on the legal content of the right of self-determination and is largely confined to material drawn from colonies achieving their independence. Originally prepared as a thesis for Cambridge University, the work describes how the Mandate and Trusteeship systems first conceded to the inhabitants of non-self-governing territories some say in their future. Once lack of preparation was acknowledged as no longer a bar to independence, the presence of the metropolitan power in the colony lost its legal foundation unless confirmed by an act of self-determination. Within the context of colonialism, the author shows that self-determination became a peremptory norm rendering a State's title to territory in its colonies void. Corollaries of this legal proposition became the separate legal personality of the colony distinct from the metropolitan power prior to obtaining independence, and the consequent exclusion of the latter's plea of domestic jurisdiction to defeat international enquiry. Further, force used to support the subject of self-determination became legal while its use on behalf of the metropolitan power was illegal and might constitute aggression or intervention.

Much of the evolution of the right of self-determination contained in this volume can be explained by the political impetus of 'the passionate yearning for freedom' of all colonial peoples and the reluctant admission of its justice by European colonial powers. The true test of its legal content in anything but a narrow historical sense will be the application of the right to units within independent States. One of the difficulties, as the jurists in the *Aaland Islands* case, 1921, recognized, then becomes the definition of the subject of the right and the government against whom it may be exercised. As Sureda shows, in the colonial context, the historical colonial unit was accepted as the 'people' entitled to self-determination, but in plural societies (Biafra, Ruanda-Urundi) or areas with a history of shared control between third States, such as Cyprus and Israel, this is an unworkable definition. Recent events in Western Sahara and Angola support this view.

Again, is only an overseas government liable or may a local government exercising power in disregard of the political rights of minorities be taken as one against whom the right of self-determination may be asserted? Professor Calogeropoulos-Stratis in his monograph (1973) maintains the right is so exercisable, but this would raise democratic government to the status of an international legal principle, a position which is certainly not borne out by State practice today. Finally, the content of the right has to be determined. Is it a once for all opportunity to select one's own political destiny or a continual process of self-realisation in the economic as well as political field?

These are not the only issues distinguished and examined in this valuable book. The useful factual histories of colonial evolution to independence, accompanied by maps, give a detached account of the inconsistent role played by the United Nations. In these pages are made plain the sacrifice of economic viability for the barren prestige of a sovereign micro-State and the disregard of the human rights of their own minorities by independent States who at the same time trumpet the virtues of self-determination in areas outside their hegemony. Is it not perhaps time for international law to show a greater sensitivity to political needs and to elaborate a model of free regional association with some commitment to the observance of human rights? Some politically acceptable right to association would provide a useful counterweight to the overworked concept of State sovereignty.

HAZEL FOX



*Universelles Völkerrecht. Theorie und Praxis.* By ALFRED VERDROSS and BRUNO SIMMA. Berlin: Duncker & Humblot, 1976. 687 pp. DM 58.

Even outside the German-speaking world of learning lawyers will be familiar with Professor Alfred Verdross's textbook on public international law. In conjunction with Professors Verosta and Zemanek of the University of Vienna he published a fifth edition in 1964, which was noticed in this *Year Book*, 40 (1964), p. 422. Now the distinguished author, who is probably the doyen of Europe's international lawyers, together with Professor Simma of the University of Munich (who describes himself as one of the youngest German-speaking teachers of public international law), has produced a work which is entirely new, and the reader is even left guessing whether it is intended to replace the earlier book or whether a sixth edition of the latter may be expected to appear at a later date.

In many respects the new work is a conventional textbook on the public international law of peace. It treats all or almost all those topics which one has come to look for in a work of its kind, though some of them are dealt with a little cursorily, and it provides the reader with access to the sources and the material which, though it is referred to selectively, is likely to lead to additional treaty practice, decisions and literature. This may have been a necessary method, as the subject has become so vast and the material, including the practice of national courts, which the authors tend to neglect, has become so extensive and so inaccessible that a textbook of about 700 pages must now be something entirely different from a practitioner's handbook, such as Oppenheim was twenty years ago.

Yet this work is far from traditional and it is necessary to acquaint the reader with some of its novel features. They are indicated by the title. One might have been under the impression that by its very nature public international law was universal and that, therefore, it was tautologous to speak of Universal Public International Law. The authors' focal point is the Charter of the United Nations which they treat as the constitutional law of a community of nations that, so they believe, has become universal. Accordingly it is the Charter, the 'new' public international law created within its framework and the law of 'the former classical public international law' such as the Charter presupposes and accepts, to which this work is devoted (p. 5):

Since the admission of numerous new members to the global community of nations the general public international law is in a state of rapid reform and evolution. Hence it is necessary, in addition to the discussion of its rules already generally recognised, to examine also those which envisage universal application, as well as to present several resolutions of the General Assembly of the United Nations which either maintain new assertions of law or aim at a change of the public international law at present applicable.

The 150 nations forming the United Nations are treated as a law-applying and law-giving community. What one misses more than anything else in this work is any discussion of or guidance to that process of weighing, that selection of representative and leading nations, that emphasis on the quality and authority of voters (or non-voters), that separation of chaff from wheat, that independence from mere numbers, which in the eyes of some can alone secure the future supremacy of the law. (On these important questions see most recently the thoughtful remarks by W. K. Geck in *Bundesverfassungsgericht und Grundgesetz (Festgabe für das Bundesverfassungsgericht, 1976)* pp. 128-30.)

It is probably the paramount importance attributed to the United Nations that is responsible for the scheme of the work. In point of form it includes not more than four parts. The first, comprising pp. 23-70, is headed: conception, development and

peculiarity of public international law. It contains a discussion of some modern problems which the general part of a textbook cannot overlook. There are, for example, short chapters on the 'allegedly primitive structure' of international law, on collective and individual liability, on the principles of *bona fides* and *humanitas*, reciprocity and effectiveness, but the authors also accept lock, stock and barrel Wolfgang Friedmann's highly questionable phrase 'from co-existence to co-operation' (p. 59).

The second part (pp. 71-199) deals with 'the constitutional principles of the community of nations', that is to say, mainly with the United Nations, its constitution and practice, and its Specialized Agencies. The 'particular' international law prevailing in certain regions (Europe, South America, Africa) is omitted. Nonetheless it deserves to be mentioned that the authors very rightly emphasize (p. 26) that the secondary law of the European Economic Community is public international law and that the same applies to what is frequently, but inaccurately and unhelpfully, described as the 'internal law' of international organizations (p. 25).

The third part is by far the longest (pp. 200-654). It is entitled 'The reception of the classical rules of public international law by the U.N.O. Charter and their further development'. The outstanding and unusual feature of this part is that all international law is subsumed under or at least brought into line with the U.N.O. Charter and its implications. Great weight is attached to the Resolutions of the General Assembly and, in particular, the Declaration of Principles of International Law concerning Friendly Relations and Co-operation among States of 24 October 1970; although the authors state (pp. 230, 329 sqq.) that the Declaration is not a source of international law and although they describe it as the framework for a discussion of the fundamental duties imposed by the Charter, the following pages do not always give so limited an impression and take very little account of the double-talk which occurs in the practice of U.N.O. or of the cleavage between the verbiage of a frequently irresponsible majority and the facts of its life and actions.

There follows, finally, a short chapter (pp. 655-9) with a few words reviewing the past and looking to the future.

It is hoped that enough has been said to indicate the general character of this stimulating and challenging work. Its content is so rich that it is impossible to select specific subjects for discussion or even to mention the authors' suggestions on some of the burning questions of international law in the modern world. The temptation to do so is great. To mention a single example, the somewhat poorly reasoned assertion (p. 227) that the Nuremberg judgments rest on retrospective criminal law could provoke substantial criticism. Another point which appears remarkable is that the fate of Austria after 1938 and of Germany after 1945 has given rise to innumerable problems of international law, which have produced an enormous literature and very many decisions, but they are nowhere specifically treated in this textbook. Not even Austria's 'occupation theory' and its manifold implications are mentioned. The authors are far too much concerned with their underlying philosophy to which few will find it possible to adhere.

In conclusion a serious technical defect should be pointed out, so that it may be avoided in future editions. Each section of the book is numbered. Thus the section on treaties is numbered 3.4.3. But there are many subsections. Thus the subsection on the conclusion of treaties by international organizations is numbered 3.4.3.5.5. So far so good. The trouble is, however, that the references are to numbered sections rather than pages and that these sections are not indicated at the top of each page, so that it becomes most inconvenient and cumbersome to find them. Thus on p. 370 footnote



so one finds the remark: 'On this see 2.3.15.2.1., 3.9.6.' The reader will readily appreciate that it takes time to identify the passages so referred to.

F. A. MANN

*The United Nations and Rhodesia, a Study in International Law.* By RALPH ZACKLIN. New York: Praeger Publishers, 1974. xi+188 pp. (including appendices and index). £7.75.

This is a relatively small volume which will interest those who seek to understand the Rhodesian issue and the problems it has created for the international legal system, particularly from the point of view of the United Nations. It is written in the very expressive and clear language that is characteristic of Dr. Zacklin's writings. The book may be divided into three parts, the first of which is concerned with the background to the Rhodesian problem. This traces the origins of Rhodesia from the time of Cecil Rhodes and Lo Bengula. The author looks at the seeds of the Berlin Conference in order to locate the colonial problem and the origins of the involvement of international law. Chapter 3 deals with the emergence of the Third World which in a way sets the stage in preparation for the dramatic display of diplomacy by the newly emerged States in the United Nations. The second part of the book is broadly concerned with the Rhodesian sanctions which receive further comment in this review; while the final part comprises appendices covering official documentation. On the face of it the reciting of texts of Resolutions of the Security Council and those of the General Assembly is superfluous; but the author is in fact to be complimented because this chronology is comprehensive. A rare service is thus rendered to the researcher. The appendices also cover the first two Special Reports of the Sanctions Committee of the Security Council on the Implementation of Sanctions. The author discusses the details of these appendices in the body of the text. What he succeeds in doing in the appendices is to present the more important documentation to substantiate observations he has made. Though often referred to, these details are rarely available in the form presented.

In the second broad category of material dealing with the economic sanctions (parts II and III), the usual story one reads in the numerous articles dealing with the topic is unfolded. The analysis and narrative is fairly detailed. Perhaps more insight could have been given if the research and writing had not been done in only six months. Herein is the revelation of Britain's ambivalence in her handling of the Rhodesian problem. (The word ambivalence appears in reference to Britain several times in the text.) Nor does the United States come out well from the time it openly decided to break the sanctions with the importation of chrome (the Byrd Amendment). Here one would have wished the details of the intense lobbying in the House of Representatives and business circles to come out more clearly, as well as the lack of official support which is cursorily mentioned on page 92. The problem concerning non-members in relation to the U.N. Charter is treated in the context of Switzerland which, on the basis of its neutrality, refused to submit to the mandatory sanctions of the U.N. but chose to limit its trade with Rhodesia to the pre-U.D.I. level. Germany of course claimed from the outset that she was participating in the sanctions, although initially she was not party to the Charter.

The author looks at details of specific incidents such as that of the *Joanna V*, and the working of the Rhodesian creation of UNIVEX, alleged to be for the specific purpose of beating the sanctions. The specific convictions in cases like those of *Super*



*Heater Co. Ltd.* and *Lloyds and Scottish Finance Company* are similarly detailed. These are among the many interesting details. Others include the number of cases reported by Britain to the Sanctions Committee (p. 94) and the details of the votes in the debates of national legislatures and U.N. organs. In disclosing these details, the author does not lose sight of doctrine, which is considered in the light of the particular drama.

There are possibly one or two disappointments overall. Throughout the drama, the Smith regime is a major actor. Yet next to nothing is said about the many ingenious arguments the Smith regime raised against the legal validity of the sanctions. Similarly, the breaches by South Africa and Portugal are skated over and none of their legal arguments are examined.

The role of the Commonwealth and individual members of the O.A.U. (except Zambia) does not emerge clearly. Nkhrumah's Ghana should not be forgotten as it was clearly the most far-sighted critic of the sanctions when they were initially conceived by Britain. The negative role of Japan called for more notice. Well-known studies on the subject of sanctions should have found a place at least in the footnotes: Ronald Segal's pioneer study on economic sanctions and Kapungu's work are conspicuous omissions.

What then has the author succeeded in doing? Throughout the thorough treatment of the final documents and the relevant speeches, Ralph Zacklin has succeeded in explaining the mingling of law, economics and politics in an international context. His study, fortunately, leaves some hope for the future of sanctions although he is also right in emphasizing the role of other forces, including political factors operating in the metropolitan centres. In this respect the epilogue is particularly interesting. Economic sanctions alone seem not to be a sufficient answer to the Rhodesian problem.

L. J. CHIMANGO

*Les Missions permanentes auprès des organisations internationales*, Vol. IV. By GERDA ZELLENTIN with the assistance of JOHN GOORMAGHTIGH. Brussels: Établissements Émile Bruylant, 1976. 165 pp. Bfr. 1200.

This is the final volume of a series which can fairly be said to have explored every facet of the work of permanent missions. The three earlier volumes, which were reviewed in previous volumes of this *Year Book*, analysed the part played by permanent missions in the United Nations and a number of other organizations. In those volumes, it will be recalled, detailed empirical studies and a comparative description of the status and activities of such missions were used to explore both their general characteristics and their role in particular areas of decision-making.

The object of the present work is not further investigation, for there can surely be little left to investigate, but rather the drawing of a number of general conclusions from the findings of the earlier volumes.

After a brief description of the historical development of permanent missions, their relationship with the sending State and with the various organizations are examined. This is followed by a description of the decision-making role of permanent missions in those organizations and a final section discussing their influence and significance.

Although this survey is in the main a recapitulation of the results of the earlier investigations, it is useful to have those results so skilfully summarized and to be reminded of how these studies have underlined the complex and increasingly significant role of permanent missions. It should also be added that her ability to review

the project as a whole has enabled the author to show how analysis of the permanent mission in the light of international relations theory provides the answers to a number of questions about the changing relationship between States and international organizations.

The original text was in German and has been freely translated by M. Goormaghtigh, who has also contributed both a foreword on the methodology of the whole project and his own substantive comments. Like its predecessors the present work includes a detailed table of contents instead of an index. In addition the last thirty pages set out in full the tables of contents of the three earlier volumes and thereby further increase the usefulness of this final contribution to an outstanding series.

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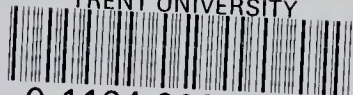








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